IN THE

Supreme Court of the United States

October Term, 1976

No. 75-562

ROSEBUD SIOUX TRIBE,

Petitioner,

v.

HONORABLE RICHARD KNEIP, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

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Respondents adopt, for the purpose of this Brief, the material in the Brief for Petitioner under the heading of "OPINIONS BELOW."

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief for Petitioner with the exception that Petitioner neglected to mention the order of the court of appeals respecting a rehearing. A motion for leave to file an enlarged petition for rehearing en banc out of time was considered by the court of appeals and denied on September 16, 1975 (App. 32).

STATUTES INVOLVED

In addition to the Act of April 23, 1904, 33 Stat. 254 (App. 531), the Act of March 2, 1907, 34 Stat. 1230 (App. 869) and the Act of May 30, 1910, 36 Stat. 448 (App. 1044) cited by Petitioner, the crux of this case centers around certain

provisions of the General Allotment Act of February 8, 1887, 27 Stat. 388 (R. App. 104) construed by this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975) because these same provisions are also contained in the Act of March 2, 1889, 25 Stat. 888 (R. App.75) which created the original Rosebud Reservation.

QUESTION PRESENTED

Whether three surplus land statutes enacted pursuant to what was in essence Section 5 of the General Allotment Act were intended by Congress and understood by the members of the Rosebud Sioux Tribe to disestablish certain portions of the original Rosebud Reservation.

STATEMENT OF THE CASE

On July 30, 1972, the Rosebud Sioux Tribe filed this declaratory judgment action requesting the United States District Court for the District of South Dakota, Western Division, to declare that three surplus land statutes, enacted pursuant to what was in essence Section 5 of the General Allotment Act, were not intended by Congress to diminish the territory of the Rosebud Reservation from that originally defined in the Act of March 2, 1889, *supra*. The *Rosebud* suit was one of a series of cases, including *DeCoteau*, that had recently been initiated in an attempt to resurrect the original boundaries of several Indian reservations in the State of South Dakota. In *Rosebud*, as in *DeCoteau*, the focal point of attention was the General Allotment Act of 1887. According to Petitioner and the other original boundary advocates, this 1887 Act marked a dramatic departure in terms of a continued congressional policy that disestablished portions of Indian reservations. Brief for Plaintiff at 13, District Court. To capitalize on the result of *Seymour v. Superintendent*, 368 U.S. 351 (1962), Petitioner also utilized the uncertain-sum characteristic of the Rosebud Acts as the basis for several additional sophisticated arguments. However, even these arguments were still irrevocably intertwined with the General Allotment Act argument.

Accordingly, the issue as presented to the district court was simply one of congressional intent — whether the three acts passed after the General Allotment Act represented a congressional determination to disestablish any portion of the original Rosebud Reservation. Then, as now, both parties conceded that any congressional determination remained the same in all three Acts. The *Rosebud* record made clear that the effect of the first Rosebud Act had to be the intended effect of all three.

The initial district court brief for Petitioner was filed before the *DeCoteau* decision. It only summarily referred to a few isolated excerpts of legislative history. Respondents prepared and forwarded to the district court the complete legislative history of all three Rosebud Acts, as well as other documentation from which the surrounding circumstances could well be established. In addition, approximately two hundred pages of briefs and appendices were eventually submitted.

Nineteen months later, on February 7, 1974, the district court issued a 53-page memorandum opinion, setting forth at length the language, legislative history and the surrounding circumstances of the three Acts in support of its decision. The materials all pointed unmistakably to the court's conclusion that the three Rosebud Acts were intended by Congress to have an effect on certain portions of the original reservation similar to that later found by this Court in *DeCoteau*. The reservation nature of the portions of the original Rosebud Reservation affected by the three surplus land statutes, namely, parts of the counties of Gregory and Lyman, South Dakota (1904 Act), the entire county of Tripp, South Dakota (1907 Act), and the county of Mellette, South Dakota (1910 Act) was effectively disestablished. See Map, *infra* at 34. The Court further noted that the area unaffected by any of the acts, presently known as Todd County, South Dakota, remained intact and that the present boundaries of the Rosebud Reservation encompass only Todd County.

The court found that as the result of nearly a decade of legislation, the Tribe and the Government had spoken clearly. They had agreed to a process that carved out a diminished reservation. In addition, scattered allotments were left in the counties in question. This, too, was a fact situation later specifically recognized by this Court in *DeCoteau*. *DeCoteau*, *supra* at 447.

Clearly distinguishable from this fact situation is the untenable position rejected in *Moe v. Confederated Salish and Kootenai Tribes*, 44 U.S. L.W. 4535 (April 27, 1976), that allotment *per se* pursuant to Section 6 of the General Allotment Act eventually disestablished reservations.

Both in *DeCoteau* and Rosebud, Section 5 of the General Allotment Act served as the basis for surplus land cessions or sales approved and enacted in special statutes by Congress. When the language, legislative history and surrounding circumstances of one of these special statutes enacted pursuant to Section 5 of the General Allotment Act, make clear that Congress intended to disestablish a distinct portion of the reservation affected, then this Court in *DeCoteau* has held:

> exclusive tribal and federal jurisdiction is limited to the retained allotments. 18 U.S.C. § 1151(c). See, *United States v. Pelican*, 232 U.S. 442. *DeCoteau*, *supra* at 446-447.

Although decided before *DeCoteau*, the decision of the district court reached this same conclusion.

The decision of the district court was in conformity with over sixty-five years of state and federal precedent. As in *DeCoteau*, the decision of the district court did not alter the status quo. *DeCoteau*, *supra* at 449. As a finding of fact, the district court noted:

> Certainly this is the treatment that has been accorded those counties from the time of the acts' passage on. There is *no dispute* but that the State of South Dakota has treated the counties of Mellette, Tripp, Gregory and what was at that time Lyman county, as portions of the state over which the State of South Dakota can exercise jurisdiction *since the passage of those acts*. Pet. App. 109.[1]

Before this Court, Petitioner has now attempted to raise a new issue that was not presented to the district court in any of the pleadings or in any of the briefs, the alleged "unilateral" nature of the three acts in question. This aspect of Petitioner's argument first surfaced, and even then rather indirectly, on March 13, 1974, when Petitioner appealed the decision of the district court to the Eighth Circuit Court of Appeals.

In the court of appeals, approximately six hundred pages of briefs and appendices were again filed by counsel for Petitioner and by the United States as *amicus curiae* in support of the arguments of the Rosebud Sioux Tribe. At oral argument on September 12, 1974, the panel below indicated that it was reluctant to decide the issue until this Court decided the then pending *DeCoteau* case. As a result, no further action was taken on the issue until March 12, 1975 when the court of appeals requested a supplementary brief from each of the parties directed to the applicability and effect of the *DeCoteau* decision. App. 30. An additional eighty-five pages of supplementary briefs were then filed by Petitioner, the United States and Respondents. In the supplemental briefs, all of the major arguments and types of documentation presented in *DeCoteau* were thoroughly examined in the context of the *Rosebud* materials.

On July 16, 1975, the court of appeals issued a 62-page opinion which analyzed all of these arguments. After considering the language, the legislative history and surrounding circumstances of the three Acts in question in light of *Seymour v. Superintendent*, 368 U.S. 351 (1962), *Mattz v. Arnett*, 412 U.S. 481 (1973), and most recently *DeCoteau*, *supra*, the court of appeals found it:

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1. Unless otherwise stated, all emphasis is supplied. The documents cited as R. App. were inadvertently omitted in the single appendix. They are included in the appendix prepared by Respondents which was submitted with this brief.

> clear beyond reasonable question that the Acts were passed with the intent of doing away with the Reservation in those portions affected . . . The problems before the Congress at the turn of the century with respect to the western lands permitted no easy solutions. The choices were difficult but they were made by the representatives of the people and it is not our function to fashion a wiser course under the guise of interpretation. Pet. App. 60-61.

It was again noted that the decision of the court only maintained the status quo. Since the passage of the Acts in question, all parties had, as in *DeCoteau*, recognized the jurisdiction of the state therein. Pet. App. 3-4.

After the decision was announced Petitioner initially indicated to Respondents that a petition for rehearing en banc would not be filed. On July 31, 1975, the time for filing such a petition expired. However, on September 3, 1975, the court of appeals received a 110-page document from the Land and Natural Resources Division of the Department of Justice that was to serve, among other purposes, as an enlarged brief for the United States as *Amicus Curiae* in support of Petitioner's request for rehearing en banc. Six days later, on September 9, 1975, the court of appeals received the motion of Petitioner for leave to file the accompanying enlarged petition for a rehearing en banc out of time. By order of the court dated September 16, 1975, the motion was denied. App. 32.

On October 11, 1975, a petition for certiorari was filed with this Court. On May 24, 1976, this Court granted the petition.

The issue now presented to this Court was before the district court and the court of appeals for consideration for over three years. In addition to the complete legislative history submitted to the district court by Respondents, fourteen separate briefs, a total of 560 pages, and over 640 pages of appendices, were presented in support of the arguments of the respective parties. Both courts unequivocally found the position of Petitioner and the United States to be untenable and contrary to the language, legislative history and surrounding circumstances of the Acts in question.

The majority of the affirmative arguments of Petitioner and the Government, although sophisticated, were variously treated and described by the courts below as:

> . . . not in point . . . misapprehends the applicable criteria . . . inconclusive and unpersuasive . . . cannot accept . . . nowhere do we find, in the legislative history or materials from the period, any indication in substantial support . . . we cannot ignore the legislative history . . . the argument made will not withstand analysis in light of the realities of the situation confronting the Congress at the time . . . the record is barren of any disclosed intention thereby to preserve intact the area of the original reservation and its boundaries. Such an intention is utterly foreign to the entire tenor of the contemporary materials before us . . . the argument stems from a misinterpretation of legislative history . . . Pet. App. 6, 8 n. 8, 15 n. 21, 26, 30, 31, 33, 42, 54, 83.

In other instances, the courts below simply noted "no explanation" whatsoever was even offered by the Petitioner or the United States on crucial points such as why, at the end of the decade of the *Rosebud* legislation, did the principals responsible for the three Rosebud Acts succinctly describe the Rosebud Reservation in the Congressional Record, the Senate and House Reports and other sources as "a diminished reservation," "successively reduced to less than one-fourth of its original area" by "three cessions" in "the past eight years" or "openings within the past few years" so that as *the* Rosebud Reservation it contained "one million acres of land" and as *the* Rosebud Reservation it was "reduced to the limits of Todd County," "embraced in Todd County" or "lying wholly within the boundaries of Todd County," if the decade of Rosebud legislation was not intended by Congress to alter the boundaries of the original Rosebud Reservation which contained over three million acres of land and encompassed most of five separate counties.

The position of Petitioner before this Court remains the same. The arguments of Petitioner and *amici curiae*, though more varied and sophisticated, are still "utterly foreign to the entire tenure of the *Rosebud* documents." Pet. App. 54. No

new documentation of substance in support of these arguments has been presented. No one has offered this Court the alternative constructions to the references in the Rosebud documents that effectively undermine the theory upon which the position of Petitioner is founded. Strident criticism now forms the primary basis for Petitioner's present assertions. According to Petitioner and *amici curiae*, for some unstated reason, even with the guidance of *DeCoteau* and after having thoroughly examined the complete legislative history of all three Rosebud Acts and over twelve hundred pages of argument and other documentation for over three years, both courts below were simply incapable of accurately ascertaining the intent of Congress and the understanding of the Rosebud Sioux Tribe. On their face, the opinions of both courts erode the merits of this assertion.

INTRODUCTION

The parameters within which issues related to reservation disestablishment are resolved have been firmly established. *DeCoteau, supra* at 444-45.

By the very nature of the case presented, as in *DeCoteau*, it is impractical if not impossible to present all of the relevant documentation in the Rosebud Acts. For this reason, Counsel for Respondents have adopted the same basic format for this Brief that they utilized in their presentation of the *DeCoteau* documents to this Court in 1975. Under the first subheading of argument, Respondents have initially addressed the congressional philosophy prevalent at the time of the General Allotment Act and the Sisseton-Wahpeton Act of 1891 to reestablish the tenor of the era. Next, in their proper historical sequence the Rosebud documents are set forth at length, commencing with the Act of 1889, which created the original Rosebud Reservation, and ending with the unsuccessful attempt to open Todd County. Then, subsequent congressional enactments, reports and documents along with expressions of the Department of the Interior, the Tribe and South Dakota historians are examined. Finally, the substan-

tive arguments advanced by Petitioner and *amici* are analyzed from this historical perspective.

At the outset if it should be noted that Petitioner and *amici* assert that affirmation of the decision below would "destroy the reservation status" of untold portions of other reservations. The court below, in recognition of one of the most fundamental principals of federal Indian law, stated that "obviously separate treaties and agreements with separate tribes must be separately construed." P. App. 112. Under the guidance of *Seymour, Matz* and *DeCoteau*, Congressional intent and tribal understanding will continue to be the controlling factors. In this light there cannot be a predetermined result.

Due to the vastness of the Congressional Record concerning the Rosebud Reservation, Respondents have selected representative passages which accurately convey the tenor and direction of the discussions. Respondents submit that a thorough review of all the legislative history will confirm the appropriateness of the passages selected.

After describing the task of construing surplus land statutes as a "narrow one," this Court recognized that "we cannot remake history." *DeCoteau* at 449. For a number of reasons, while neither condemning nor condoning the actions and statements contained in this history, Respondents agree and have reported the facts as accurately as possible.

SUMMARY OF ARGUMENT

This Court has established that the key inquiry in determining whether or not a given statute has disestablished a reservation or portion thereof is congressional intent. In this regard, one looks to the text of the act itself, its legislative history and the surrounding circumstances. It is Respondent's contention that the Rosebud legislation fits squarely within the same historical circumstances deemed to be determinative by this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

In *DeCoteau*, Congress had passed an 1891 surplus land statute pursuant to Section 5 of the General Allotment Act of 1887, which disestablished the Lake Traverse Reservation. The policy of the General Allotment Act, as established in Section 5, sought to achieve two objectives: first, to promote Indian welfare by alloting portions of reservation lands, formerly held by the tribe in common to individual tribal members, and second to dispose of all surplus, unallotted reservation lands in order to make such surplus lands available to settlers under the homestead laws. These two objectives are the "familiar forces" noted by this Court in *DeCoteau*, at 432.

The Rosebud Indian Reservation was established when the Great Sioux Reservation was divided up into six separate reservations and the bulk of the original Great Sioux Reservation opened to homesteading by the act of March 2, 1889. In accordance with the General Allotment Act, Section 12 of the 1889 Act provided for further negotiations with the Sioux Indians for the further disposition and sale of portions of the reservations established by the 1889 act. The text of Section 12 is identical with Section 5 of the General Allotment Act. Portions of the original Rosebud Reservation were opened to settlement and disestablished by three surplus land statutes passed in 1904, 1907 and 1910. Each of these Acts was passed in pursuit of the policy established by Section 5 of the General Allotment Act and reinterated in Section 12 of the 1889 Act.

This fact situation is clearly distinguishable from untenable position rejected in *Moe v. Confederated Salish and Kootenai Tribes, supra*, that allotment *per se* pursuant to Section 6 of the General Allotment Act eventually disestablished reservations.

Just as the 1889 Act disestablished large portions of the Great Sioux Reservation and the 1891 Sisseton-Wahpeton Act disestablished all of that reservation, the three Rosebud Acts disestablished various portions of the Rosebud Reservation. The courts below correctly interpreted each of these

Acts and found that for all three Acts, the text, the legislative history and the surrounding circumstances all made clear Congress' intent to disestablish portions of the Rosebud Reservation. Respondents devote a large portion of their brief to a careful and comprehensive discussion of the legislative history, surrounding circumstances and the text of each of these three Acts.

In 1901, the United States and the Rosebud Sioux Tribe negotiated a cession agreement providing that the Tribe would "cede, surrender, grant and convey" for a certain-sum a portion of its reservation, an agreement virtually identical to that in *DeCoteau*. Before Congress ratified this agreement, it amended it for fiscal reasons to provide that the method of payment would be an uncertain-sum with the exact consideration dependent upon sales of the surplus lands to settlers. Although this arrangement was familiar to the Rosebud Sioux Tribe because of its inclusion in the 1889 Great Sioux Reservation Act, the amended agreement received the formal approval of only a majority of the adult male members when it was presented to them in 1903, instead of the three-fourths required by an earlier treaty. Acting upon this Court's recent reiteration of congressional authority in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), which involved a similar reservation fact situation, Congress ratified the agreement as amended in 1904. The 1904 Act affected Gregory County, South Dakota.

The 1907 Act, affecting Tripp County, was based upon another negotiated cession, agreement like that in *DeCoteau* except for its use of the uncertain-sum method of payment. A majority of the Tribe again formally approved the Agreement. Rather than repeating the negotiated agreement verbatim, this statute merely contained the substance of the agreement. Thus the operative language became "sell and dispose of all that portion of the Rosebud Indian Reservation" rather than the previous cession terminology.

The same language and format was used in the 1910 Mellette County Act. Although no attempt was made at hav-

ing a majority sign a formal cession agreement, the tribe was consulted and reportedly approved the measure by a large majority. As a result a formal document was not prepared, as such a formality was no longer considered to be necessary by Congress.

In all cases, Congress' intent to disestablish a portion of the Rosebud Reservation by each Act is overwhelming. The Congressional debates and committee reports make this eminently clear. These sources, and the other relevant materials, are replete with references to each of the Acts as reducing the size and changing the shape of the reservation, as a cession and surrender of a portion of the reservation, as extinguishing a portion of the reservation, and as leaving a diminished reservation and restoring lands to the public domain. The Sisseton-Wahpeton Act in *DeCoteau* and the 1889 Great Sioux Act were referred to as precedents in that these Acts and the three Rosebud Acts all extinguished reservation status and returned lands to the public domain.

Further there is no question but that these same documents also make clear the Tribe understood the Rosebud Acts as having disestablished portions of their reservaton. Moreover, the tribal councils which took place in 1911 concerning another proposal to further reduce the Rosebud Reservation are conclusive evidence of the tribe's understanding as to the three earlier Acts. One cannot read the transcripts of the meetings regarding the proposed opening of Todd County and not be persuaded that the earlier three Acts, as far as the tribal members were concerned, had disestablished portions of the reservation.

Petitioner and the various *amici*, being unable to rely on the legislative history or the historical circumstances of the Acts for support, have developed a series of technical arguments, derived in the abstract by counsel, with no reference to the actual legislative history. Petitioner and *amici* then attempt to tie some of these arguments to various provisions of the Acts, such as the school lands provision, the allotment provisions, the prohibition of liquor in Mellette

County, and the reservation of timber and other lands for agency, religious, and educational purposes. With regard to each of these provisions, Petitioner and *amici* have merely given their interpretation as to how these provisions would indicate a Congressional intent not to disestablish the Rosebud Reservation. However, Petitioner and *amici* never refer to the Congressional debates or the committee reports, instead merely giving their own opinions and not what Congress itself intended regarding these particular provisions. In contrast, Respondents have, in all cases, scrupulously gone to the original sources, the Congressional debates and the committee reports, in order to ascertain what Congress' intent was in including these various provisions in the various Rosebud Acts. In all cases, the legislative history makes clear that Congress' inclusion of these provisions was totally consistent with, and sometimes directly predicated upon, disestablishment of the portions of the reservation affected.

Petitioner and *amici* also attempt to show that the later administrative and legislative treatment of the area affected by the three Rosebud Acts is inconsistent with disestablishment of portions of the reservaton. Much to the contrary, the complete legislative record is replete with statutory references to the "former Rosebud Reservation" or to areas "formerly a part of the Rosebud Reservation." Additionally, the area in question has consistently been treated as not a portion of the reservation by the Department of Interior, Bureau of Indian Affairs, and the Tribe itself. The BIA and the Tribe have consistently refused to grant benefits and privileges to tribal members living on non-trust land in the areas affected by the Rosebud Acts, a situation now rectified by *Morton v. Ruiz*, 415 U.S. 199 (1973). Such treatment provides an additional source with which to confirm Congress' intent to disestablish portions of the Rosebud Reservation by passage of the three Rosebud Acts.

The cartographic treatment of the area affected by the three Rosebud Acts is identical to the treatment of the former Sisseton-Wahpeton Reservation. The Court in *Devereau*

made note of this cartographic history and again in Rosebud it is another source confirming Congress' intent to disestablish the Rosebud Reservation.

The Indian Reorganization Act, from which Petitioner and *amici* have also extracted arguments, has little relevance to a determination of the Congressional intent embodied in the 1904, 1907 and 1910 Rosebud Acts. When viewed in their entirety, however, the Indian Reorganization Act and the relevant orders and opinions issued pursuant to the Act support the position of Respondents.

Finally, a discussion of 18 U.S.C. 1151 makes clear that, in passing that statute relative to criminal jurisdiction in Indian country, Congress in the 1940's understood that the three Rosebud Acts had disestablished the Rosebud Reservation in the areas affected by those Acts. In enacting 18 U.S.C. 1151(a), Congress relied on cases arising out of Todd County, the Rosebud Reservation. The consistent holdings of other cases was that the areas opened by the Rosebud Acts were outside the boundaries of the reservation.Congress enacted 1151(c) to cover this situation. All of the cases make clear that only Todd County in 1948 was within the boundaries of the Rosebud Reservation. Subsequent case law has been in accord with this result. Thus, as in *DeCoteau*, the decision below did not alter the status quo.

Petitioner alleges that the Rosebud Acts were not cessions and makes much of the fact that the purchase of the surplus and unallotted lands utilized the method of an uncertain-sum in trust. In making his "cession" argument, Petitioner ignores this Court's decision in *Lone Wolf v. Hitchcock*, is clearly pointed out in the congressional debates in all three Rosebud Acts. *Lone Wolf* confirmed Congress' understanding that tribal consent was not necessary in order to dispose of surplus lands. Nevertheless, the Tribe approved by a written majority vote, although less than a three-quarters vote, the agreements to sell surplus and unallotted lands embodied in the 1904 and 1907 acts. Congress also consulted the Tribe with regard to the 1910 Act.

Petitioner's attempt to distinguish *Rosebud* from *DeCoteau* on the basis of the uncertain-sum method is similarly untenable. The 1889 Act also utilized an uncertain-sum as the method of payment for the lands acquired by the government pursuant to the Act to divide up the Great Sioux Reservation. There is no question that that Act resulted in the disestablishment of the Great Sioux Reservation. Petitioner attempts to argue that the use of the uncertain-sum method was a radical change in Federal Indian policy. Again, Petitioner has merely made an assertion and has failed to look to the congressional debates to determine the validity of that assertion. The Rosebud debates in 1901 through 1904 make clear the fact that Congress saw the uncertain-sum approach as being purely a fiscal and economic concern. It was never intended that the difference in method of payment would have any substantive effect on the disestablishment policy established in Section 5 of the General Allotment Act. The debates clearly establish that Congress was looking for a method of avoiding large direct payments by the Treasury and providing land at a reasonable price to settlers. The uncertain-sum method was particularly appropriate to solve Congress' concerns. The switch from the certain-sum back to the uncertain-sum was not indicative of a change in fundamental federal Indian policy. Section 5 of the General Allotment Act and its familiar forces continue to be the major thrust of federal Indian policy.

The Rosebud record itself refutes most of the arguments of Petitioner and *amici*, because they are not based upon the language, legislative history and surrounding circumstances of the Rosebud Acts. In addition, Petitioner's remaining arguments were equally applicable in *DeCoteau* and were rejected there.

In *Seymour*, *Mattz* and *DeCoteau*, the Court has clearly established the rule that congressional intent is to be followed in determining whether a given act opening surplus and unallotted lands to settlement had the effect of disestablishing the area affected by the act from any Indian reservation. The

search for that intent lies primarily in the text of the act and in the legislative history and circumstances surrounding the act. In Rosebud, as in *DeCoteau*, all three factors are clear and unambiguous. Congress intended to disestablish portions of the Rosebud Reservation by each of the three Rosebud Acts. Petitioner's attempts to find artificial, rigid and technical reasons for disallowing this congressional intent are inappropriate. The search for congressional intent must lie with the acts themselves, the committee reports, the legislative history, and the understanding of the tribe itself. Arbitrary rules proposed by Petitioner do not assist the Court in determining Congressional intent. Rather a detailed review of the legislative history of the acts is necessary and this is what Respondents have provided.

ARGUMENT

I

THE FACE OF THE ACTS, THEIR SURROUNDING CIRCUMSTANCES AND LEGISLATIVE HISTORY ALL POINT UNMISTAKABLY TO THE CONCLUSION THAT THE ROSEBUD LEGISLATION WAS INTENDED BY CONGRESS TO DISESTABLISH PORTIONS OF THE ORIGINAL RESERVATION.

> If the policy of allotting lands is conceded to be wise, then it should be applied at an early day to all alike wherever the circumstances will warrant. If we have settled upon the breaking up of the tribal relations, the extinguishment of the Indian titles to surplus lands, and the restoration of the unneeded surplus to the *public domain*, let it be done thoroughly. If reservations have proven to be inadequate for the purposes for which they were designed, have shown themselves a hindrance to the progress of the Indian as well as an obstruction in the pathways of civilization, let the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away. Report of Commissioner of Indian Affairs 8, (1891).

A. The General Allotment Act of 1887.

The passage of the General Allotment Act in 1887 did not constitute a fundamental change in federal Indian policy.

Prior to 1887, it was the fundamental precept of federal Indian land policy that the ratification of a cession agreement would extinguish the Tribe's claim or title to the affected area. If the ceded area or area to be disestablished included only a portion of the reservation, the reservation boundaries would be necessarily diminished to include only the reduced area of the remaining reservation. If an entire reservation was to be ceded or disestablished, the boundaries were also necessarily disestablished, and the tribes involved usually were required to remove to another reservation. In both instances, the area was automatically restored to the public domain and "opened" to homesteading. The consideration was usually a certain-sum direct per capita cash payment to the tribe or individual members thereof.

After passage of the General Allotment Act, Congress continued to disestablish Indian reservations by tailoring cession agreements to conform with the guidelines set forth in Section 5 of the General Allotment Act. *DeCoteau, supra.* In fact, disestablishment after passage of this Act took place at a much more rapid pace then had theretofore been possible. In two respects, however, the post 1887 legislation differed materially from the earlier legislation. Most significantly, individual members of the tribes were assured under the General Allotment Act of individual acreages in the form of allotments. These individual allotments were made pursuant to Section 5 of the General Allotment Act. The land which remained after allotment was referred to as "surplus" or "surplus and unallotted" land. Section 5 of the General Allotment Act made provision for the eventual disposal of this surplus land. The term "surplus land statute" was used to describe the entire process of disposing of this land subsequent to allotment.

Secondly, those primarily responsible for the passage of the General Allotment Act professed a sincere belief that an individual member of a tribe who had received an allotment, as well as the United States, would be better off after a surplus land statute was enacted and the surplus lands opened to

settlement. The allotted member of the tribe would be exposed to "civilization," and this exposure was deemed a necessary step toward the status of citizenship. Sale of the surplus land would create a fund which would serve as a source of income for the allottee until that status could be fully obtained. Moreover, the United States would, at the same time be making available for cultivation vast tracts of land that had theretofore been lying idle. The allottee and the homesteader could cultivate the land side by side, and, as a result, the entire country would benefit. These were the "familiar forces" of Section 5 of the General Allotment Act referred to in *DeCoteau* at 431.

In 1892, the Commissioner of Indian Affairs again addressed these forces at length in terms of letting "the reservations, as speedily as wisdom dictates, be utterly destroyed and entirely swept away." Report of the Commissioner of Indian Affairs, 136 (1892). As a graphic illustration of the "familiar forces," the Report stated that under Section 5 of the General Allotment Act "during the past three years more than 24,000,000 acres of Indian land had been restored to the public domain." Report of the Commissioner of Indian Affairs, 136 (1892). In retrospect, both the goals of this aspect of the General Allotment Act and some of the motives behind it may be questionable, but at the time they were wholeheartedly accepted in good faith.

An example of a surplus land statute enacted pursuant to Section 5 of the General Allotment Act assists in explaining the operation and effect of such a statute. Assume a certain cession or sale for the entire eastern half of a reservation was proposed in 1888, but only a certain percentage of the members of the tribe had as of that date received an allotment. If this proposal nevertheless met with the approval of the Commissioner of Indian Affairs, he would write the Secretary of the Interior and cite Section 5 of the General Allotment Act which provided, in part:

> And provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to *negotiate* with such Indian tribe for the *purchase and release* by said tribe, in conformity with the treaty or statute under which such reservation is held, *of such portions of its reservation* not allotted as such tribe shall, from time to time, consent to *sell*, . . . R. App. 107.

This section would allow the United States to negotiate for the release of "such portions" of the reservation as were not allotted, regardless of the fact that only a certain percentage of allotments had yet been made, and these were scattered throughout the entire reservation. If the Secretary concurred with the proposal, he would appoint either one or several commissioners and ask that the Commissioner of Indian Affairs submit a "Draught of Instruction" for his approval. After approval, the instructions would be forwarded to the commissioners. In most instances the information contained therein was of a very general nature.

The Commission would go to the reservation, negotiate with the tribe for the surplus lands and draw up a document for the approval of the Tribe containing the price per acre and such other specific provisions as the United States and the tribe might wish to resolve. In some cases the "cession" or "sale" terminology would appear in the text of the document, and in others it would not. In some cases, the "public domain" and "diminished reservation" terminology would be referred to repeatedly in the text of the document, and in others it would not. In all cases, the document would describe or separate the surplus area by some boundary marker or other survey from that portion of the reservation unaffected, i.e., the diminished reservation.

The only restriction in Section 5 on the method of payment for the "purchase and release" of "such portions" of the "reservation not allotted" that the Tribes were to "sell" was simply:

> Such terms and conditions as shall be considered

> just and equitable between the United States and said tribe of Indians. R. App. 108.

Equally broad language in Section 5 governed the terms of the eventual disposal of the surplus portions of the reservation to the bona-fide settlers — "such terms as Congress shall prescribe." R. App. 108. Thus, congressional discretion was virtually unlimited.

In exercising this broad discretion, the United States would ordinarily agree to purchase the surplus land directly from the Tribe for a certain-sum. Significantly, however, even as early as 1888 the United States sometimes elected to use the uncertain-sum method of payment. In all instances, however, the eventual disposition of the proceeds for the land was governed by Section 5:

> Purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians *to whom such reservation belonged*. R. App. 108-09.

The entire document would not be effective until ratified by Congress, again pursuant to the requirements of Section 5 of the General Allotment Act. In Washington, the document would be amended by the Congress to provide that the surplus lands to be sold or released by the Tribe would be held by the United States as trustee for the sole purpose of securing homes to actual settlers if it was adaptable for agricultural purposes again pursuant to the requirement of Section 5 of the General Allotment Act.

The surplus portion of the reservation would thereby become essentially a part of the public domain when opened to homesteading upon amendment and ratification by Congress and Proclamation by the President. Any other portion of the reservation would remain intact and be referred to as the diminished reservation, or the remaining reserve, or just the reservation. As for those individual members of the tribe whose allotments were now to be situated in the newly created public domain, they were generally given the option to remain so situated or to relinquish their allotment and

remove to the diminished reservation and reselect therein. At a later date, this whole process could be repeated one or more times on the same reservation. The original reservation would be repeatedly reduced in size, with each surplus area restored to the public domain and opened to actual settlers. Again, many members of the Tribe would elect to remain situated in the "former" reservation areas.

There would be no question in this instance as to the effect of the document as ratified on the boundaries of the original reservation, even if construed in an historical vacuum. With each opening, there would necessarily be some delineation of the area opened from the area remaining within the diminished reservation. Most often this delineation would appear in the act as some type of metes and bounds description because during this period in most instances the territory or the states involved had not yet been surveyed into distinct county subdivisions, or the surplus area did not coincide with the county boundaries. When an act provided for the opening of all of the unallotted surplus land of the reservation, however, the effect Congress intended was not so apparent. Initially, no one questioned the effect of surplus land statutes on the boundaries of any reservation. To those at all familiar with the overall policy of the United States, the answer would have been an almost obvious corollary of the act itself. After all, these were the familiar forces of the era. The lapse of time, however, and the absence of any singular concrete reference from which to readily obtain a proper historical perspective, together with the inconsistencies and policy reversals which characterized the whole arena of Indian affairs in later decades, understandably clouded the issue — especially in the aforementioned case of where the entire reservation was opened to settlement by such a statute. This was precisely the fact situation presented in *DeCoteau*.

The many parallels between the Sisseton-Wahpeton Act and the Rosebud Acts makes an examination of *DeCoteau* of critical importance.

B. *DeCoteau v. District County Court*, 420 U.S. 425 (1975).[2]

> In 1887, the General Allotment Act (or Dawes Act) was enacted in an attempt to reconcile the Government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon reservation lands. The Act empowered the President to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit.
>
> Against this background, a series of negotiations took place in 1889 with the objective of opening the Lake Traverse Reservation to settlement. *DeCoteau, supra* at 432-433.

References to Section 5 of the General Allotment Act permeated the Sisseton-Wahpeton documents. Prior to *DeCoteau*, the question of reservation disestablishment pursuant to Section 5 of the General Allotment Act had not been specifically discussed in any court opinion. Moreover, the 1891 Sisseton-Wahpeton Act did not contain any express language of termination, unlike the rather atypical examples set forth in the Note in *Mattz v. Arnett*, 412 U.S. 504, N. 22 (1973). In addition, as this Court noted, the members of the Sisseton-Wahpeton Tribe had elected to sell all of the unallotted surplus lands. In this situation, there was no "carved out . . . diminished reservation." Hence, there were no direct references to what would remain after the ratification of the agreement by either the United States or the members of the Sisseton-Wahpeton Sioux Tribe. Such references would have been a key probative source of both congressional intent and tribal understanding. In short, the precise effect of the 1891 Act on the Lake Traverse Reservation was not spelled out in the *DeCoteau* documents. No mention was made of the boundaries of the Lake Traverse Reservation. Thus, in order to accurately ascertain the intent of Congress, this Court had to establish the proper historical perspective from which to view the events in question. An overall analysis of the significance

2. The summary of *DeCoteau* that follows is only an overview of the fact situation. A review of the briefs submitted therein sheds considerable light on various aspects of the issue presented in the instant case.

of Section 5 of the General Allotment Act as well as an exhaustive review of the legislative history and surrounding circumstances of the 1891 Act provided this perspective.

The *DeCoteau* opinion makes clear that the fact situation therein was by no means unusual. Throughout the western United States many local communities were requesting that surplus reservation lands be made immediately available for farmers, merchants and railroad development. Most of the members of the tribes had already received their allotments. To act with expediency would be to act in the best interests of all concerned.

In *DeCoteau*, the initial request from the local area was for "the opening of the reservation." Letter, *DeCoteau, supra* at 431, N.8. In reponse thereto, the Commissioner of Indian Affairs forwarded the request to the Secretary of Interior for preliminary approval. Letter, *DeCoteau, supra* at 434. The Commissioner specifically directed the attention of the Secretary of Interior to "the 5th section of the Act of February 8, 1887." Letter, *DeCoteau, supra* at 434. Shortly thereafter, the Commissioner submitted a set of instructions drafted "for the guidance of a Commission . . . to negotiate with the Sisseton and Wahpeton Indians for the sale of surplus lands." The purpose of the Commission, according to the instructions, was for "negotiating with the Sisseton and Wahpeton Indians for the relinquishment of such portions of the Lake Traverse Reservation not allotted as said Indians may consent to release." Letter, *DeCoteau, supra* at 434, N. 13. In the instructions the negotiations were again expressly stated to be pursuant to Section 5 of the General Allotment Act.

> Such negotiations are authorized by the *5th Section of the Act of February 8, 1887*, which provides: 'That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such por-

> tions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable, between the United States and said tribe, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress.' Instructions at 1, *DeCoteau, supra* at 434.

The opinion of this Court in *DeCoteau* specifically noted this fact: "The instructions noted that the negotiations would be pursuant to Section 5 of the General Allotment Act . . ." *DeCoteau, supra* at 434.

It is not clear at what point, in the course of exercising the considerable discretion as to the method of payment vested in the Government by Section 5, the decision was made to purchase the surplus land directly from the tribe for a certain sum. By the time the Commission reached the reservation, however, the decision to use the certain-sum method had been made. In terms of the question of disestablishment, the Commission and the members of the Tribe interchangeably described the subject of the negotiations as simply the "sale" of the surplus lands or the "opening" of the reservation.

Although it was noted that it might be "inadvisable" to include all of the unallotted surplus land in the transaction, the operative language of the final agreement provided for precisely that:

> The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby *cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands* within the limits of the reservation . . . Act of March 3, 1891, 26 Stat. 1035.

Apart from the amount of land involved, the operative language of this surplus land arrangement was typical.[3]

In terms of tribal ratification, Section 5 of the General Allotment Act further provided that the transaction should

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3. *See, DeCoteau*, N. 22, at 439 for other examples of contemporary operative language.

be "in conformity with the treaty or statute under which such reservation is held." Act of February 8, 1887, Section 5, 24 Stat. 390. The Commissioner of Indian Affairs had earlier noted that "no provisions regarding the cession or relinquishment of the reservation or any portion thereof" could be found in the 1867 Treaty creating the Lake Traverse Reservation as a permanent reservation. Instructions at 2, *DeCoteau, supra* at 434, N. 13. It was therefore concluded that the consent of a majority of the adult male members of the Sisseton-Wahpeton Tribe should suffice. Instructions at 2, *DeCoteau, supra* at 434, N. 13. After two weeks of prolonged negotiations, the formal signed consent of a simple majority of the adult male members of the tribe was obtained.

Before the Sisseton-Wahpeton cession agreement was presented to Congress for ratification, the Government negotiators first presented a rather detailed report to the Commissioner of Indian Affairs. This report contained specific explanations for certain provisions and other recommendations. The Commissioner reviewed the report and recommended to the Secretary of the Interior that the measure be reported favorably. S. Exec. Doc. No. 66, 51st Cong., 1st Sess. (1890). In his report to the President, the Secretary followed the recommendation of the Commissioner of Indian Affairs. S. Exec. Doc. No. 66, 51st Cong., 1st Sess. (1890). Significantly, in the Secretary's report it was again noted that the negotiations were pursuant to Section 5 of the General Allotment Act :

> Allotments were made in 1887 upon this reservation to all who applied for and were found entitled thereto, in quantities as provided in the act of Congress approved February 8, 1887 (24 Stats., 388), *under the fifth section of which the negotiations resulting in the agreement now presented were conducted.* S. Exec. Doc. No. 66, 51st Cong., 1st Sess. 2 (1890).

A short time later, the entire package, i.e., the agreement, the council transcripts, the reports, and the official recommendations, was forwarded to Congress. S. Exec. Doc. No. 66, 51st Cong., 1st Sess. (1890).

In Congress, after several delays, the agreement was finally reported with certain amendments. In both the Senate and the House, the reports again confirm the substance of the above documentations regarding the role of Section 5 of the General Allotment Act:

> The negotiation of said agreement was made under authority conferred upon the Secretary of the Interior by the *fifth section of the act of Congress approved February 8, 1887* . . . S. Rep. 661, 51st Cong., 1st Sess. 1, (1890).
>
> The said agreement was duly executed December 12, 1889, under the authority conferred upon the honorable Secretary of the Interior of the *fifth section of the act of Congress approved February 8, 1887* . . . H. R. Rep. 1356, 51st Cong., 1st Session. 1 (1890).

On the floor, the congressmen addressed the question presented only in general terms. Even in this respect, most of the remarks centered around what should be the settled policy in relation to "the disposition of the public lands amongst the settlers" 22 Cong. Rec. 3454 (1891). With reference to the Sisseton-Wahpeton and the other disestablishment legislation under consideration, Senator Dawes did state that "all this land is opened by this bill to settlement *as part of the public domain,*" but he was the *only* congressman that used this particular terminology with specific reference to the legislation. 22 Cong. Rec. 3879 (1891). In all other instances Senator Dawes and the rest of the congressmen simply described the transaction as "opening" the reservations or portions thereof to settlement.

The effect of the legislation on the boundaries of any of the several reservations under consideration was never the subject of concern. Indeed, no one addressed or even mentioned the reservation boundaries. Reservation boundary disestablishment was a fact assumed and understood by all to be a necessary result of the act itself. It was inherent in the process of congressional action opening the reservation to settlement pursuant to Section 5 of the General Allotment Act.

Additional amendments to the measure were offered and accepted in the congressional debates that followed. *DeCoteau, supra* at 441, 446, N. 33. Parts of Section 26, all of Sections 27, 28, 29 and Section 30, as well as the two omnibus provisions applicable to all of the agreements, Section 35 and Section 38, were amendments to the original 1889 Agreement. The first amendments dealt with the preamble (Section 26), the certain sum appropriated (Section 27), the lands occupied by religious or other organizations (Section 28), the authority pursuant to the General Allotment Act for additional allotments prior to the opening (Section 29), and the homestead provision and school lands grant (Section 30). The omnibus provisions were directed to the lands occupied by the religious or other organizations and the school lands grant.[4] Section 35, Section 38, 26 Stat. 1035. In this form, the 1891 Sisseton-Wahpeton Act recited verbatim and ratified the 1889 Agreement. Act of March 3, 1891, 26 Stat. 1035.

After the enactment of the legislation and prior to the Presidential Proclamation, administratively the area in question continued to be treated as an Indian reservation. All of the applicable federal restrictions remained in full force, e.g. only authorized individuals were permitted even to enter the area in question and members of the Sisseton-Wahpeton Tribe continued to select individual allotments. After the completion of these administrative details, the President issued the Proclamation opening the lands to settlement. Typically the act itself had specified "that the lands . . . be subject only to entry *under the homestead and townsite laws of the Unites States.*" Act of March 3, 1891, 26 Stat. 1035. Thus President Harrison's Proclamation made reference to this fact (R. App. 72) and thereafter declared that:

> *Now, therefore,* I Benjamin Harrison, President of the United States, do hereby declare and make known that all of the lands embraced in said reservation . . . be *open to settlement* under the terms of and subject to all of the terms and conditions . . . in

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4 The significance of this provision is addressed in detail, *infra*

said agreements, the statutes above specified, and the laws of the United States applicable thereto. R. App. 73-74.

With the issuance of the Proclamation the boundaries of the Lake Traverse Reservation were necessarily disestablished. The Annual Reports of the Secretary of the Interior and the Commissioner of Indian Affairs provided confirmation of this disestablishment, which Congress assumed, compensating for the absence of any definite language in the Act and the legislative history directed to reservation boundaries. These Reports dealt extensively with the then recent General Allotment Act and thus contained express pronouncements concerning the purpose and effect of the contemporary legislation enacted pursuant to Section 5 thereof. *See*, for example, 16, 18, *supra*.[5] By the time the Rosebud legislation was enacted, this aspect of the General Allotment Act had become established policy and the express pronouncements in the earlier reports were accepted precepts. The Reports contemporaneous to the Rosebud Acts make clear in general terms that the same policy was still in effect with respect to Section 5 enactments. The documentation set forth *infra* establishes the crucial and controlling fact that, like the *DeCoteau* Act, the Rosebud Acts were also initiated, negotiated and enacted pursuant to Section 5 of the General Allotment Act. Moreover, because each Rosebud Act affected only a portion of the reservation, the Rosebud documentation is replete with the additional convincing evidence of disestablishment that was a factual impossibility in *DeCoteau*.

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5. Moreover, the Reports specifically confirm the effect of the 1891 Act on the Lake Traverse Reservation. In his Annual Report to the Secretary of Interior for 1891, the Commissioner of Indian Affairs stated " . . . The ratification of agreements in the act of March 3, 1891 (26 Stats., 989), restored to the public domain . . . from the Lake Traverse Reservation, South Dakota, about 1,021,881 acres . . . ." Report of the Commissioner of Indian Affairs, 14 (1891). The Secretary of Interior's Annual Report was identical in this respect. H.R. Exec. Doc. No. 1, 52d Cong., 1st Sess. VII (1891). Thus, the fact situation in *DeCoteau* was clearly distinguishable from the untenable position asserted in *Moe*, *supra*, that allotment per se pursuant to Section 5 of the General Allotment eventually disestablished reservations.

C. The Act of March 2, 1889: The Creation of the Original Rosebud Reservation

Prior to 1851 all of the land now comprising South Dakota was a part of the vast inland empire dominated by various tribes of the Dakota Sioux. After a series of treaties, culminating with the Treaty of 1868, all the land west of the Missouri River was set aside as the Great Sioux Reservation. Act of April 29, 1868, 15 Stat. 635. In 1877 one portion of this reservaton consisting of the Black Hills region in South Dakota was removed from the reservation by the Act of February 28, 1877, 19 Stat. 254. By the Act of February 22, 1889, the Great Sioux Reservation was further diminished by nearly eleven million acres, and from the Great Sioux Reservation were created six smaller, separate reservations, one of which was the Rosebud Reservation.

The Act to divide up the Great Sioux Reservation was passed at approximately the same time as negotiations were being conducted with the Sisseton-Wahpeton Tribe with regard to that reservation. It is significant that Congress was simultaneously pursuing two tribal negotiations, one of which involved the purchase of reservation land for a certain-sum as described above in the *DeCoteau* case, and the other of which was for an uncertain-sum. This second negotiation ultimately became the Act of February 22, 1889. Congress did not see any difficulty in pursuing these separate negotiations with their different methods of paying for the taking of reservation territory. This simultaneous use of the certain-sum and uncertain-sum approaches was in accordance with the sole limitation set forth in Section 5 of the General Allotment Act that purchases of portions of reservations should be on "terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians." In contrast to the certain-sum specified in the negotiations and Act relevant to the Sisseton-Wahpeton Reservation, Section 21 of the 1889 Act utilized the uncertain-sum approach.

Each settler under and in accordance with the

> provisions of said homestead acts, shall pay to the United States, for land so taken by him, in addition to the fees provided by law, the sum of $1.25 per acre for all lands disposed of within the first three years after the taking effect of this act, and the sum of seventy-five cents per acre for all lands disposed of within the next two years following thereafter, and fifty cents per acre for the residue of the lands then undisposed of . . . Provided, That all lands herein opened to settlement under this act remaining undisposed of at the end of ten years from the taking effect of this act shall be taken and accepted by the United States and paid for by said United States at fifty cents per acre, which amount shall be added to and credited to said Indians as part of their permanent funds . . . R. App. 92-93.

The permanent fund referred to in Section 21 was established by Section 17 of the Act for the credit and benefit of the Sioux Nation of Indians. Section 22 of the Act states:

> That all money accruing from the disposal of lands in conformity with this act shall be paid into the Treasury of the United States and be applied solely as follows: First, to the reimbursement to the United States for all necessary actual expenditures contemplated and provided for under the provisions of this act, and the creation of the permanent fund herein before provided; and after such reimbursement to the increase of said permanent fund for the purposes herein before provided. R. App. 95.

From the terms of this Act it is clear that the exact amount which the Tribe would ultimately receive was dependant upon uncertain future land sales. Although the United States guaranteed to purchase all unsold land at the rate of $.50 per acre after ten years, this in no way changes the fact that the amount of money which the tribe was to receive was uncertain and was dependant on future land sales to settlers under the general homestead laws. The fact that the United States guaranteed to purchase the land at $.50 per acre may have set a fixed minimum on the amount which the Tribe might receive, does not in any way make more certain the sum which they were ultimately to receive.

Section 24 of the Act provided for the reservation of sections 16 and 36 in each township for public school purposes. This section, which became a model for a similar section in the 1891 DeCoteau Act, *supra*, and in each of the Rosebud Acts, also made provision for the payment of $1.25 per acre by the United States to the Tribe for these sections.

While this Act speaks specifically in terms of the restoration of land to the public domain, the congressional debates and legislative history surrounding this Act did not differ materially from that surrounding the Sisseton-Wahpeton Act. The following discussions serve to illustrate this fact:

> Mr. Cutcheon. I agree fully with the chairman that this is one of the most important measures that have come before this Congress, or before any Congress of which I have been a member. It is proposed here to *open up* this great reservation . . . for my part I want to see this reservation *opened up*, not less for the Indian than for the sake of the white men . . . It attempts to do that which I most earnestly desire to see done — that is to secure the *opening up* of this great reservation, to let civilization through and around these Indian tribes . . . 20 Cong. Rec. 1495, 1496 (1889).

Once again the twin objectives, characterized as "familiar forces" in *DeCoteau*, of opening land to settlement in accordance with the homestead laws and of "civilizing" the Indian can also be seen from the legislative history of this Act.

Although Congress generally obtained firm agreements with the Indian tribes prior to the enactment of any surplus land legislation opening reservations, since the prior negotiations in this case had not been successful with the Sioux Indians, Congress took the initial step itself. It passed the 1889 Act and required in Section 28 that it be subsequently ratified by the Indian tribes. Section 12 of the Treaty of 1868 was controlling in this respect. It provided for a ratification by three-quarters of the adult male tribal members.

> Article 12. No treaty for the *cession of any portion or part of the reservation* herein described which may be held in common shall be of any validity or force as against the said Indians unless executed

and signed by at least three-fourths of all the adult male Indians . . . Treaty of April 29, 1868, 15 Stat. 635.

Congress was well aware of this provision. In the debates on the bill, the different aspects of the ratification question that were to continue to be a great source of congressional concern in the next decade were expressed on the floor of the House:

> Mr. BRECKINRIDGE, of Kentucky. I believe, Mr. Speaker that time has come when the General Government ought to recognize the fact that its duty to the Indians lies in a higher domain than in apparently keeping the letter of a treaty, a course which results in keeping the Indians vagabonds and paupers and their reservations mere breeding places of vice.
> Mr. PERKINS. And of ignorance and crime.
> Mr. BRECKINRIDGE, of Kentucky. I believe that it is in a higher domain that we must find our true relation to the Indian with reference to his development and civilization, and I think the amendment of the gentleman from Mississippi — I say it with that great respect which I have for him and all that he does in the House — is not in the line of the true interests of the Indian. As long as we give the Indian large reservations upon which to roam, and feed him, and clothe him, and thereby constantly tempt him to remain a vagabond, he will be on our hands as a constant source of expense, and not only that, but as the breeder of vice in the localities in which we keep him.
> Therefore, our true policy, I believe, is, as rapidly as it can be done under the conditions in which we find him, to destroy the tribal relations of the Indian, allot to him in severalty such land as is necessary for his support, retain in the Treasury a fair price for the land we take from him for the white settler, and for a reasonable length of time pay interest upon it in the shape of an annuity. . . .
> . . . I think under the circumstances, that the policy I have indicated is that to which we must look forward; *and I did not desire to sit here and seem by my silence to approve the principle that the American Government can not by act of Congress open these reservations, with justice toward the Indians, without their consent. The Supreme Court of the United States has decided that we have this power. I think our true interest suggests that we should exercise it; and true kindness to the Indian points in the same direction.* 20 Cong. Rec., 2d Sess., 1584 (1889).

In this instance, Congress did not have to face the issue. A Commission was appointed to present the Act and the offer it contained to the Sioux Indians for their acceptance and consent. After prolonged negotiations, the Commission submitted its report to the President of the United States on December 24, 1889, indicating that it had received the consent of three quarters of all adult male members of the Sioux Tribes affected. Ratification by tribal members was accomplished by obtaining their signatures on a document which included the following language:

> We, the undersigned, being adult, male Indians occupying or interested in the Sioux Reservation established by the Treaty between the United States and various chiefs and headmen of the different tribes of Sioux Indians on the part of such Indians, signed on the 29th day of April, 1868, do hereby certify and declare that we have heard, read, interpreted and thoroughly explained to our understanding the act of Congress of the United States of which the following is a copy to wit:
>
> [Complete Text of 1889 Act]
>
> And after such explanation and understanding with such male Indians of the age of 18 years and upwards, have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act, in each and all of the provisions thereof, and do hereby grant, cede and convey to the United States all the lands of the Great Sioux Reservation outside of the separate reservation therein described, for the uses and purposes and upon the terms and conditions therein provided. S. Ex. Doc. 51, 51st Cong., 1st Sess. pp. 234, 242.

Following ratification by the Tribes, and in accordance with the requirement of the Act in Section 21 that the land would "be disposed of by the United States to actual settlers only, *under the provisions of the homestead law,*" President Ben-

jamin Harrison on February 10, 1890, entered the following Proclamation which made reference to this fact (R. App. 98) and declared:

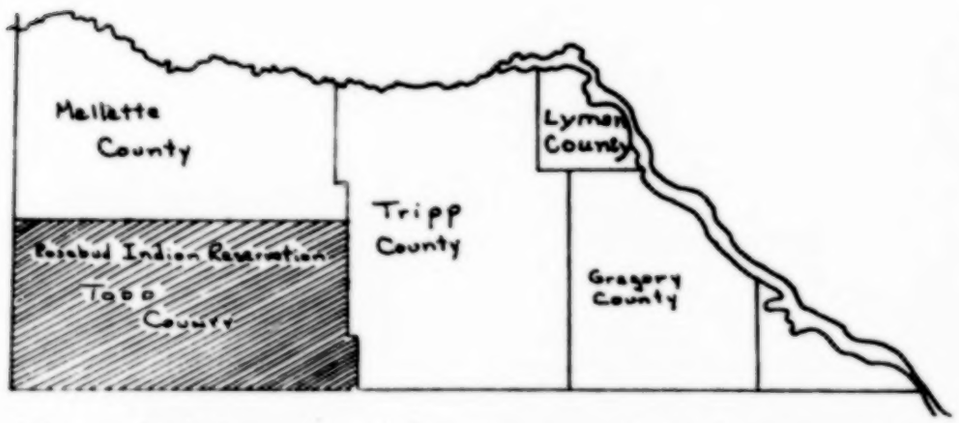
> Now, therefore, I, Benjamin Harrison, President of the United States, by virtue of the power in me vested, do hereby make known and proclaim . . . that all the lands in the Great Sioux Reservation outside the separate reservations described in said act . . . shall be disposed of by the United States, upon the terms, at the price and in the manner therein set forth, to actual settlers only, *under the provisions of the homestead law* . . . R. App. 99-101.

The 1889 Act set the stage for the Rosebud legislation. It both created the original Rosebud Reservation and served as a model for the legislation which was to follow.

D. The Rosebud Legislation[6]

1. The Act of April 23, 1904: Gregory County

One of the six reservations created out of the Great Sioux Reservation was the Rosebud. Initially, it encompassed approximately three million acres covering portions of five separate counties.



The unshaded portion of the map represents those areas of the original reservation affected by the three Rosebud Acts.

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6. A comment in 18 S.D.L. Rev. 85 (1973), also set forths the basic legislative history of the three Rosebud Acts in the context of the issue presented.

a. The 1901 Negotiations.

In the 1889 Act, Congress planned for the future diminishment of the six reservations created by the Act. In accordance with an amendment offered by Senator Dawes, Section 5 of the General Allotment Act discussed *supra* was incorporated verbatim as Section 12 of the Act of March 2, 1889:

> Sec. 12. That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner, if in the opinion of the President it shall be for the best interest of said tribe, it shall be lawful for the Secretary of Interior to *negotiate* with such Indian tribe for the *purchase and release* by said tribe, in conformity with the treaty or statute under which said reservation is held of *such portions of its reservation* not allotted as such tribe shall, from time to time, consent to *sell*, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress . . . R. App. 107.

No action was taken pursuant to Section 12 however until near the turn of the century when the familiar forces noted in *DeCoteau* set in motion certain events which would ultimately culminate in the opening and disestablishment of approximately three-quarters of the original Rosebud Reservation. The parallels between the negotiations involved in the *Rosebud* case and those involved in the *DeCoteau* case are due to the fact that the *Rosebud* negotiations were carried on under the auspices of Section 12 of the 1889 Act which was identical with Section 5 of the General Allotment Act under which statutory authority the Sisseton-Wahpeton negotiations were undertaken.

In 1898, Gregory County, South Dakota was organized with a large portion of the county lying within the Rosebud Reservation. Therefore, it was difficult to maintain a county organization. App. 34. As a result, Senator Gamble from South Dakota introduced a bill late in 1899 to authorize the Secretary of Interior to:

> Appoint a commission of three members to treat

> with the Sioux Indians within the Rosebud Reservation . . . for the *cession* to the United States government of all Indian land in Gregory County, South Dakota. App. 34.

On February 8, 1900, the Commissioner of Indian Affairs, W. H. Jones, fowarded a copy of the bill to the Secretary of Interior. App. 34. In the cover letter, Commissioner Jones noted that:

> The part of the county open to settlement is largely occupied by settlers who are very anxious to have the government take action looking to the *cession* of that portion of the county within the limits of the Rosebud reservation. App. 34.

The Commissioner described the area in question as the "eastern portion" of the reservation and directed the attention of the Secretary to the provision in the 1868 Treaty that addressed the three-fourths requirement for future cessions. App. 35. In this respect, the Commissioner concluded that "more satisfactory results would be obtained" by:

> conducting such negotiations through a United States Indian Inspector instead of having a commission appointed consisting of three members to negotiate such agreement. App. 35.

When Senator Gamble reported the bill on March 3, 1900, the Report of the Committee on Indian Affairs reflected the recommendation of the Commissioner. App. 42. Moreover, the Report made clear that the "familiar forces" noted in *DeCoteau* were at work on the Rosebud Reservation.

> The people are anxious that this particular part of the reservation be opened and opportunity given for settlement and development of that region of the State . . .
>
> The committee is informed the Indians are willing to treat for a *cession* of the lands in question. To do so would be carrying out the policy of the Government in this particular and in harmony with treaty stipulations and the provisions of the law of 1889, in the opening to settlement of the ceded portions of the Great Sioux Reservation. Those Indians have made their selection for allotments, and this bill only relates to the *surplus* lands of the reservation which are not used and unnecessary to the support and maintenance of the tribe. The Indians have their full allotments, and they are ample for their use. By opening the lands to occupation and development it would inure to the benefit of the people, the community, the State, and to the Indians themselves. App. 43.

While the bill was pending before the Senate, the legislature of the State of South Dakota joined in support of the measure by memorializing Congress to "restore to public domain" the area in question. App. 48.

> A joint resolution and memorial requesting the Congress of the United States to treat with the Indians for the cession and opening for white settlement and free homestead entry all that portion of the Rosebud Indian Reservation lying within the boundaries of Gregory County, S. Dak.
>
> Whereas there is in the organized portion of Gregory County, S. Dak., about six Congressional townships, said tract being too small in area, population, and assessed valuation to successfully maintain a county government without causing such government to become unduly burdensome; and
>
> Whereas there is also within the boundaries of said Gregory County, S. Dak., about 23 Congressional townships of agricultural land which forms a part of the Rosebud Indian Reservation, and upon which are living a few Indians who have all taken their allotments in severalty; and
>
> Whereas it is understood that the Indians are willing for a reasonable compensation to cede all that portion of the reservation herein mentioned to the Government; and
>
> Whereas the ceding of said portion of the reservation to the Government would still leave a sufficiently large and suitable territory to meet all the requirements of an Indian reservation, while at the same time the ceding and opening to white settlers of all that portion of said reservation above referred to would add to the productive farming land of the State, enlarge the area of Gregory County to a proper and desirable size, and greatly lessen the expense of maintaining the government of said county: Therefore, be it
>
> *Resolved*, That we respectfully petition and

> memorialize the Congress of the United States to treat with the Indians at the earliest practicable date for the cession of all that portion of the Rosebud Indian Reservation lying within the boundaries of Gregory County, S. Dak., and that said tract be open to free homestead entry by white settlers; and be it further *Resolved*, That we hereby request our Senators and Representatives in Congress to use their best efforts to effect the object prayed for in this memorial; and the secretary of state is hereby instructed to forward copies of this memorial to our Senators and Representatives in Congress. App. 48, 49, 50.

Shortly thereafter, the matter was resolved by a special provision in the Indian Appropriation Act approved March 3, 1901, which provided:

> "That the Secretary of the Interior be, and he is hereby authorized, in his discretion, to negotiate, through any United States Indian Inspector, agreement with any Indians for the *cession* to the United States of portions of their respective reservations or *surplus* unallotted lands, any agreements thus negotiated to be subject to subsequent ratification by Congress." App. 52, 53.

With the passage of this provision, two members of the South Dakota congressional delegation commenced work in the area that was eventually to result in their assuming a leadership role in the House and the Senate for the next decade in all aspects of federal Indian legislation.

Senator Gamble was elected to the United States Senate in 1900 and he remained in that office until 1912. He was very active in all federal Indian legislation during this period. Senator Gamble's fellow solon, Charles H. Burke, was also elected in 1900. He remained in that office until 1908 when he was defeated in the election. He was, however, re-elected in 1910 and served until 1914. Congressman Burke later served for several years as Commissioner of Indian Affairs. Both Senator Gamble and Congressman Burke chaired the Indian Affairs Committees of their respective houses, and both sponsored and reported considerable federal Indian legislation including the three Acts involved in this case.

As a result of their efforts, on March 19, 1901, James McLaughlin, an Indian inspector for the Department of Interior, who ultimately served that Department for over fifty years, was instructed by the Commissioner of Indian Affairs to commence "*negotiations* with the Indians of the Rosebud reservation, in South Dakota, for the *cession* of the unallotted eastern portion of their reserve." App. 53. The instructions of the Commissioner noted that:

> *To preserve the regularity of the reservation boundary in the event that a cession* is made, the townships east of the west boundary line of Gregory County in township 100 to wit, fractional township, range 71 and townships, ranges 72 and 73 lying in Lyman County, should also be *ceded*. App. 54.

In Inspector McLaughlin's words:

> I went to these same Indians with a proposition involving an agreement for the *cession* of a great body of land that was required for settlement by the whites. The land lay in Gregory County, South Dakota, and there were about four hundred and sixteen thousand acres in the tracts. The deal was a big one and there were many big talks. J. McLaughlin, *My Friend the Indian* 309 (1910).

Inspector McLaughlin met with members of the Tribe in April, August and September of 1901. The following extracts from Council Transcripts are representative of the discussions at these meetings. On April 15, 1901, Inspector McLaughlin first met with the Indians of the Big White River district and explained the situation in this manner:

> INSPECTOR McLAUGHLIN: The Government desires to purchase of you people the unallotted portion of the Gregory County lands. I will point out to you on this map the tract of land desired, so that you may see and understand it better. In case of the *cession* of the unallotted lands lying within Gregory County, you who have received allotments will not be disturbed on your land at all. Every person would have the privilege of remaining on the land that has been allotted to him, or of relinquishing it and *removing to the diminished reservation, but I would advise you who have selected tracts of land to remain upon your allotments in*

> *case of the cession of this land to the Government* . . . We are not going to transact any business today, as we are not ready for that, as I want to have every Indian of the reservation meet in council, so that they can all hear what is said on both sides . . . App. 334.
>
> OLD LODGE: Of course we do not want to express ourselves right now, but we will get together ourselves in a few days from now and we will consider this matter very carefully, and when we come to the regular council we will then notify the people of our thoughts in regard to the land. App. 334, 336.

In late summer at the Ponca Creek District of the Rosebud Reservation, the negotiations continued in a similar tenor.

> INSPECTOR McLAUGHLIN: My friends, I have called to see you today for the purpose of ascertaining whether or not you are willing to sell the unallotted lands in Gregory County to the Government. As you all understand, under your old treaty of 1868, it requires a three-fourths majority of the adult male Indians in order to legalize any treaty for your land. It requires three-fourths of the adult male Indians of the entire reservation. Before talking with the Indians of the reservation, I desired to see and learn something of the character of the land and to meet you people in this district, who are more directly interested than the others. You doubtless know that there has been considerable talk for the past two years of *negotiating with you people for this corner of the reservation.* Last year there was legislation introduced, but it failed to become a law. This last session of Congress a bill was introduced, authorizing the Secretary of the Interior to negotiate with the Indians for this land, and it is a general law now . . . App. 326. In negotiating with Indians for tracts of land, a portion of which has been allotted to them, the privilege has been given to Indians to elect whether they shall remain upon their allotments or relinquish

> their allotments and *remove to the reservation.* I do not think that it is for the best interests of the Indians at any time to vacate their allotments. The lands that you have taken are, of course, the best lands of this county, and it is very doubtful if you could find as good land anywhere within the *diminished* reservation for the reason that the best lands have been allotted . . . App. 327.
>
> I will now listen to what you may have to say in regard to the matter. I am ready to answer any questions that you may ask me in regard to it, and after you are through I will talk a little further. Now, the question that I would like to have you answer is whether you desire to dispose of your lands in Gregory County or not. If you dispose of this surplus land *it will leave you about the same sized reservation as the Pine Ridge Indians have.* App. 328.

At this juncture, Respondents are compelled to draw two points to the Court's attention. First, in the context of the 1901 Agreement and negotiations, Petitioner admits that ratification would have necessarily resulted in disestablishment of a portion of the Rosebud Reservation. Thus, even Petitioner has to concede that during this period use of the phrase "diminished reservation" by the parties meant diminished reservation boundaries, not diminished "ownership." Secondly, as evidenced by the statements of Inspector McLaughlin, the proposed agreement was viewed in 1901 as a surplus land measure.[7]

Because of the prevalence of smallpox on the reservation, Inspector McLaughlin waited until September 5, 1901, to convene another council:

> I am here under orders of the Secretary of the Interior who was authorized by Congress, at its last

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7. Similar "surplus" terminology permeates the *DeCoteau* documents, and others set forth, *supra.* In this light, Petitioner's tendered "definition" of a surplus land statute, which is limited to only uncertain-sum Acts, is patently untenable.

session, to negotiate, through any Indian inspector, with any Indian tribes for the *cession of their surplus lands*, and he has sent me here to negotiate with you for your *surplus lands* in Gregory County, that is, for all of your lands in Gregory County that have not been allotted to Indians . . . If an agreement for these lands is reached by us, the allottees of Ponca Creek district will be brought into direct contact with the white settlers but as I said before, it is only a question of time until that condition has to be met . . . App. 337-338.

The cession of Gregory County will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge reservation . . . App. 339.

TWO STRIKE: I will ask you to tell about the price you are going to offer for the land which you have mentioned to us . . . App. 339.

INSPECTOR McLAUGHLIN: That is a good suggestion. I will first say that there is a lowest and highest price for government land, known as the minimum and maximum price. The minimum price for Government land, which is the lowest price, is $1.25 an acre, but your land is worth more than that, and I am ready to listen to any reasonable proposition and consider it, and give you all that is possible, but it must be such as to meet Departmental approval and ratification by Congress.

LITTLE CROW: Well, you say $1.25 an acre. We ought to have a little more than that.

INSPECTOR McLAUGHLIN: I am willing to give a little more than that, yes considerable more than that. App. 340.

In the above exchange, the cession terminology clearly emerges. Again, there was reference to the "compact and almost square" shaped reservation that would remain after the transaction. The Indians then retired to council over the matter among themselves and on September 10, 1901, the council reconvened.

INSPECTOR McLAUGHLIN: What price do you hold the land at — that is, the unallotted land in Gregory county? We want no other lands except those in Gregory County — the unallotted. App. 345.

ONE TO PLAY WITH: Well, I know, but I don't want to sell it, and I don't want to say anymore about it. App. 345.[8]

RED FISH: All of us people down in the lower part of the reservation have got children, and we don't know what to do, and we have just stuck one of these white willows in the ground. We have stuck one of those white willow trees in the ground, and we brace our heart to it. All of our little children and ourselves we take our hearts as one and embrace it . . . My friend, that is the reason I want to tell that I don't want to sell, and I brace my heart against this willow. App. 345.

GOOD VOICE: All of our people east of here want me to say certain things. You have just come here to ask us a question. Since you only came here to ask us a question, we have stuck that willow in the ground to set fast to with our hearts. We don't know what to do, so we stuck that fast there to hold on to. Since you have come here just to ask us questions, we have put that willow in the ground, and we want you to take that offer back with you and think the matter over. If you ever come again, by that time we will now what to do, and then you can come here again. App. 346.

TURNING HAWK: My friend, look me in the face. My people have sent me here to say a word and I am going to say it on account of my people. I have been thinking about our children growing up, and I want to say something in regard to them. While I am not a chief myself, yet, I am going to say something that I will stand by. Our children will grow up here yet, so we don't want to sell the land, and I thought I would come here and tell you about it. We people have got to live yet, and the children are growing up; therefore I don't want to sell it. App. 346.

INSPECTOR McLAUGHLIN: My friends, I hoped to have an expression from you in regard to the price you hold those lands at, but all who have talked have spoken in opposition to the cession. App. 346.

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8. As was true during the Sisseton-Wahpeton negotiations, when tribal members used the terminology of selling the land or reservation, they understood this to be disestablishing the reservation. Although the members of the Sisseton-Wahpeton Tribe never described the transaction as a "cession," the members of the Rosebud Sioux Tribe did frequently also refer to the substance of the negotiations as a "cession." In this respect, the expression, as indicia of tribal understanding is more persuasive in *Rosebud* than in *DeCoteau*.

HIGH HORSE: My friend, you have come here to talk about the people's lands here, and want to ask me a question. I will never help the President any more, and I am not going to give you this land. App. 346.

INSPECTOR McLAUGHLIN: There have been six of you speakers who say that you do not wish to sell your land. My friends, frequent complaints have been made to the Department that the Rosebud Indians were destitute and suffering because of short rations, but your refusal to sell your unallotted lands in Gregory County will satisfy the Department that you are not so needy. If a man should have a horse for which he had no use and represented to me that he was broke and hungry, and then should refuse to sell the horse at any price, I would conclude that he was not deserving of help . . . The white people of the country, and particularly those in this section of the country, that is, I mean the section of country where your lands are, are demanding the opening of that tract of country and it is only a question of time until it will be opened, and I can make you such conditions now that it will be of great benefit to you, and you should not come here with your eyes closed and your ear closed to any proposition that I may offer, and look at the question as it actually is, that those lands will be opened before long anyway, and now you have an opportunity of making a good bargain with the Government through me, and you ought to avail yourselves of this opportunity . . . Now, I was sent here by the Secretary of the Interior to endeavor to make an agreement with your people. I hoped when I came here that I would be able to do so, and I am going to do my part at least and announce to you what *I am ready to offer for that land*. I do so that you may consider it as something to think of, and in case you refuse that you will sooner or later regret that you had not accepted the offer. App. 346-347, 350.

The impasse subsided when Inspector McLaughlin announced that he was ready to "offer" for the land. The remainder of the negotiations were primarily concerned with only the price per acre and conditions of payment. An agreement was reached on these two issues on the 14th day of

September, 1901, and the council adjourned. By October 4, 1901, the requisite three-fourths of the adult male Indian population had signed and the agreement was forwarded to the Department of the Interior.

At the conclusion of the negotiations and following the pattern established during the Sisseton-Wahpeton negotiations, the Inspector prepared a report that portrayed the negotiations to date:

> Under instructions contained in Department letters of the respective dates of March 21 and May 21 last, and Indian Office inclosures, I have the honor to transmit herewith an agreement, dated September 14, 1901, entered into by me, as United States Indian inspector, on the part of the United States, with the Indians of the Rosebud Agency, S. Dak., by which the said Indians *cede* to the United States their *surplus or unallotted* lands lying within the boundaries of Gregory County, S. Dak., approximating 416,000 acres, for a consideration of $1,040,000. App. 319-320.

The agreement negotiated by Inspector McLaughlin with the Rosebud Tribe of Sioux Indians was a certain-sum cession agreement whose operative language is substantially identical with that of the Sisseton-Wahpeton Agreement:

> The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby *cede, surrender, grant, and convey to the United States all their claim, right, title and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted*, situated within the boundaries of Gregory County, South Dakota, described more particularly as follows: . . . App. 382.

Neither Inspector McLaughlin nor the Tribe was at any time unaware of the effect this cession was to have on the exterior boundaries of the reservation. They knew a portion of the reservation was to be disestablished. Had Congress merely ratified this agreement, there is doubt that anyone would seriously contend otherwise. In fact, before this Court even Petitioner and *amici* now concede that had Congress ratified the substance of this 1901 Agreement, the reservation in Gregory County would have been disestablished. Pet. at 14.

b. Congress Rejects the Certain-Sum Provision of the 1901 Agreement.

Unknown to the negotiators of the 1901 certain-sum cession agreement, some members of Congress desired a change in the practice of paying tribes directly from the United States Treasury for the purchase of reservation land and then offering this land free to settlers under the general homestead laws. The arrival of the 1901 Agreement in Washington proved to be the catalyst for a lengthy and heated debate in which the forces favoring a change in the practice were ultimately successful.

Congress has used various methods of opening reservation lands to settlement. Prior to 1887, most agreements utilized the certain-sum method. Between 1887 and 1889, both the certain-sum and the uncertain-sum methods were employed. From about 1890 through the turn of the century, Congress again favored certain-sum enactments. However, the winds of change began to blow and members of Congress expressed dissatisfaction with the certain-sum policy.

Congress' primary concern was simply that it was too expensive to give western land away under a free homestead program. Although Congress could have selected a method whereby the particular tribe would continue to receive a certain sum directly from the United States Treasury, which would have been reimbursed by the settlers as they entered the lands, this approach was rejected for two major reasons. First, it necessitated a large direct lump-sum payment from the Treasury at the outset, and second, Congress had had difficulty in the past with collecting the reimbursement from the settlers. Had this method been adopted, the boundaries of a given reservation would as a result have been diminished. *DeCoteau, supra* 445.

Instead Congress seized upon the uncertain-sum method which had been seldom used for a period of almost ten years. In terms of the problems discussed above, this approach, which had been used in the 1889 Act was particularly appropriate as it solved both problems while still allowing

settlers to acquire land at reasonable prices. The use of the uncertain-sum approach was an almost perfect solution. The use of the uncertain-sum approach in 1889 had disestablished portions of the Great Sioux Reservation, and as Respondents shall show, was intended by Congress to do the same in the Rosebud Acts.

On October 11, 1901, the agreement and accompanying documents were presented to the Commissioner of Indian Affairs so that a draft of a bill embodying the agreement could be prepared for Congressional consideration. The draft was prepared, and on the 23rd of November, 1901, it was forwarded to the General Land Office for the addition of a section to provide for "the disposition of the land *ceded*." On December 3, 1901, this section emerged from the Land Office and the bill was presented to the Senate on March 4, 1901. It is at this point that the controversy over free homesteads began.

Senator Gamble, a leading proponent of the free homestead policy, made this argument in an attempt to convince the Senate to maintain its present practice of certain-sum payments to the Indian tribes followed by free homesteading:

> It has long been the policy of the Government to open the Western reservations to free homes. The homestead law enacted so many years ago certainly proved of inestimable value, not only to the West, but to the country at large. A different policy was inaugurated some ten or twelve years ago, under which, when reservations were opened, the settler was obliged to pay the same price for the land that the Government paid the Indians for the relinquishment of their title.
>
> Two years since, a free-homes bill was passed by Congress after having been discussed at great length, especially in this body. It occurs to us that by that act the homestead policy has been reestablished by the Government. App. 64-65.

The opposition, led mainly by eastern Senators, favored a pay-homestead provision and an amendment to that effect was proposed. The argument advanced in favor of this approach was stated by Senator Platt of Connecticut:

The question is whether the Government, in opening the lands to settlement, shall give the lands thus purchased from the Indians to the settlers under the homestead law, or whether it shall require the settlers who take up these lands under the homestead law to pay for them a sum per acre equivalent to what the Government pays the Indians for them. In other words, in opening the Indian reservations which already remain, what is to be the policy of the Government? *Are we to pay the Indians a high price for the lands which we obtain a cession of, and then give those lands to the settlers free of cost, or shall we require the settlers to pay as much for the lands as will make up wholly for the amount which we have paid for them?* That is the question, and Senators will see that it is a far-reaching question.

I do not know how many million acres still remain in Indian reservations which must in the future be opened to public settlement, but there are many millions, and, at the rate we have been paying the Indians under the agreements made with them for such lands, the amount to be expended in the not very distant future will run up into the millions. App. 77-78.

A comment by Senator Clapp of Minnesota shows that the essence of the controversy was fiscal and not related to the policy of disestablishing reservations.

> MR. CLAPP. . . . Here is this reservation in South Dakota. Of course the Senators from South Dakota can speak more specifically of the character of the reservation and its surroundings than I can; but because we have to pay the Indians a certain amount for that reservation, as a matter of progressive Indian policy, for the purpose of separating the Indians and *extinguishing the reservation* or for the purpose of meeting the advancing demands of civilization for the use of the lands, it does not follow that the land is primarily and inherently worth so much an acre. App. 109-110.

A further statement by Senator Platt demonstrates that the gist of his concern was also economic and not related to the policy of disestablishing Indian reservations pursuant to Section 5 of the General Allotment Act.

> Now, this particular agreement comes here to be ratified upon a payment to the Indians of about $2.50 an acre for the surplus lands within their reservation which are under the agreement to be ceded to the United States and become part of the *public domain*. The Indians in negotiating said that was not a fair price for the lands and they were worth a great deal more, but finally the negotiation was concluded. The agreement comes here. *So far as the Senate considers it, it is an agreement to open a reservation — to pass ordinarily without any particular examination or any thought of the consequences to the Government in the matter of expense.* App. 80-81.

Although Senator Gamble defeated the proposed amendment in the Senate, the opposition gathered strength in the House and the free-homestead provision was defeated. The House Committee Report summarized the uncertain-sum provision, which was inserted by the House Committee, and the effects of this provision.

> [I]t will establish a new policy and be a departure from the policy that has long since prevailed in acquiring Indian lands, as heretofore it has been the practice and policy of the Government to purchase lands from the Indians and pay them therefor and then open the same to entry and settlement, and if not immediately, ultimately, under the provisions of what is known as the free-homestead act.
>
> *This bill provides that the lands shall be disposed of under the homestead laws by the settler paying therefor and the proceeds paid to the Indians, and it is expressly provided by section 6 of this bill that the United States shall in no manner be bound to purchase any portion of the land except the school sections, or to dispose of the same except as provided, or to guarantee to find purchasers for said lands, it expressly stating that the intention of the act is that the United States shall act as trustee for the Indians in disposing of the lands and pay over the proceeds from the sale thereof only as the same are received.* App. 631. [9]

9. The reference to the "new policy" in the House Committee report accurately reflects that in reference to the cession methods being used during this particular time span, the uncertain-sum policy would be "new" even though it had been utilized by Congress in the past as recently as 1889.

The whole of the congressional debate concerning the 1901 Agreement revolved around the free-homestead versus pay-homestead issue.

The thrust of the entire debate was fiscal and economic. App. 76 to 236. The policy established by Section 5 of the General Allotment Act and incorporated in Section 12 of the 1889 Act of disestablishing and opening to settlement Indian reservation continued unchanged. The pay-homestead provision with concommitant requirement that payments be made directly to the Treasury in trust for the tribe was the only departure from the traditional federal Indian policy recently examined by this Court in *DeCoteau*. Thus, Congress simply returned to the uncertain-sum arrangement used in 1889. This return to that arrangement and the reasons for its adoption had nothing to do whatsoever with reservation disestablishment.

Since *Seymour*, *Mattz* and *DeCoteau* make clear that congressional intent controls, Petitioner would have this Court believe that the change in congressional practice which took place between 1901 and 1904 was a dramatic change in overall federal Indian policy. Petitioner argues that during this period, Congress reversed its long standing practice of disestablishing reservations pursuant to Section 5 of the General Allotment Act. Respondents maintain, as both lower courts held, that the language of the 1904 Act, its legislative history and the circumstances surrounding the 1904 Act clearly demonstrate the contrary. At least in this case, the congressional intent remained the same. The change contemplated by Congress concerned merely the method of payment and nothing else, and was aptly suited to that end. Then, as is occasionally true now, a program whose policy is accepted by all was embroiled in controversy over the method of its financing.

In support of this position, Respondents note that Felix Cohen, in his survey of federal Indian policy, found no essential changes in that policy to take place during the period from 1887, the passage of the General Allotment Act, to 1934,

the passage of the Indian Reorganization Act. Cohen, Handbook on Federal Indian Law 68-88 (1942).

During the period between the 1901 agreement with the Tribe and the decision by Congress to change their free-homestead policy, this Court decided the case of *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

This decision confirmed Congress' belief that it had plenary power to deal with the Indians as it deemed best. The holding of *Lone Wolf* had been anticipated for some time as evidenced by Congressman Breckenridge's statement on the House floor during debate on the 1889 Act. 20 Cong. Rec., 2d Sess., 1584 (1889), *supra*, p. 32. *Lone Wolf* represented a basic cornerstone in federal Indian law. Felix Cohen explained it in this fashion:

> The control by Congress of tribal lands has been one of the most fundamental expressions, if not the major expression, of the Constitutional power of Congress over Indian affairs, and has provided most frequent occasion for judicial analysis of that power. From the wealth of judicial statement there may be derived the basic principal that Congress has a very wide power to manage and dispose of tribal lands. F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 94-95 (University of New Mexico Press).

On fundamental constitutional grounds, *Lone Wolf* specifically recognized that Congress could, in good conscience and for the benefit of the entire country, as well as the individual members of the tribe, enact legislation of this nature *without* formally complying with an identical provision in another treaty that was said to have also required the formal consent of three-fourths of the adult members of other tribes on another reservation. The *Lone Wolf* decision is repeatedly cited, analyzed, explained and relied upon by the Commissioner of Indian Affairs, the Secretary of Interior and Congress in the Rosebud documents.

Applying *Lone Wolf* to the Rosebud situation, Congress no longer needed the ratification of three-fourths of the adult male Indian population on the Rosebud Reservation.

Nonetheless, since the Office of Indian Affairs took the position that because this bill now contained an uncertain-sum provision, it should again be explained to the Tribe, Inspector McLaughlin returned to the Rosebud Reservation.

c. The 1903 Negotiations. The Inspector received his new instructions in a letter dated June 30, 1903, from the Office of Indian Affairs. After a general discussion of the provisions with specific reference to the uncertain-sum arrangement, the letter stated:

> It is not deemed necessary herein to give you any definite instructions as to the form of the agreement and the manner of its execution inasmuch as you are thoroughly familiar with these features of the subject. *Attention* is invited in this connection, however, to Departmental *instructions* to you dated *March 21, 1901*, in connection with the negotiation of the former agreement. App. 466.

Although the instructions did not contain any reference to the recent *Lone Wolf* decision, Inspector McLaughlin was obviously familiar with that decision as evidenced by the following remarks made to members of the Tribe, upon his arrival back at Rosebud:

> I regard it, under the circumstances, and considering everything in connection with it, a very nice compliment to you people for the Department to send an Inspector to you again to council with you; for the reason that a decision of the Supreme Court of the United States, which court is the interpreter of all our laws, rendered on January 5th last, in what is known as the Lone Wolf case, that the Indian is the ward of the Government; that the Government is the guardian; that the guardian has the right to do that which is deemed best for the ward, therefore Congress has the power to enact legislation for the surplus lands of Indians, without consulting the Indians. But this is not the wish of the Secretary of the Interior, or Commissioner of Indian Affairs, nor of the Congressional delegation from this state; they wish to consult the Indians. App. 472.

The Tribe was dissatisfied and the reasons for its discontent were made known to Inspector McLaughlin. In the first

place, tribal members were disappointed with the failure of Congress to ratify the 1901 agreement. In addition, the price per acre to be paid for the lands was an ever-present concern throughout the negotiations, and Inspector McLaughlin attempted to explain the situation to them:

> There has been a *sentiment growing* in Congress for a number of years past, and is *now stronger than ever, against paying Indians for ceded lands direct from the U.S. Treasury. That is what is referred to in my letter* of instructions, which I read to you, *as being a new departure in the manner of disposing of the surplus lands of Indian reservations*, and instead of paying Indians direct from the U.S. Treasury as heretofore for their surplus lands, *they will be paid from the process of the sale of lands ceded*, the Department thus acting as trustee for the Indians, and the Interior Department having charge of the lands will dispose of them in such a manner as will secure to the Indians the highest price obtainable. *This is the new departure referred to, and I believe, my friends, that no treaty will ever again be made with Indians, by which they will receive a lump sum consideration for the tract ceded.* App. 472.
>
> [I] am here to try to enter into a new agreement, from which you will receive as much for your lands as the agreement of two years ago provided, *but the manner of disposing of it is different* . . . The Government collects from the homesteader and pays it over to you . . . *I am here to enter into an agreement which is similar to that of two years ago, except as to the manner of payment . . . You will still have as large a reservation as Pine Ridge after this is cut off.* App. 479-480, 489-490.
>
> The objections to the former agreement was not on account of the price, but to the manner of payment . . . (1903). App. 521.
>
> . . . *The Agreement which I submit for your consideration is similar in every respect to that of two years ago,* except you will have to wait for the sale of the land to receive your money . . . (1903). App. 508.

Although the Indians understood the change, to them the change was not right. They were afraid that if the Govern-

ment did not pay them directly, they would never receive the money:

> HOLLOW HORN BEAR: I am afraid that if I sign this new treaty that you will take it from us and not give us any pay only the school land money . . . I can look at the past and know by that, that we will not get the money for our land. App. 483.[10]
> REUBEN QUICK BEAR: Before, you promised that the Great Father would pay us, . . . we don't like this new way . . . App. 487.
> HOLLOW HORN BEAR: I asked you to tell the Great Father that we wanted him to buy our land himself, and that is what we want. App. 500.
> HOLLOW HORN BEAR: I will use some words that you said to us before. These people accepted the last agreement, you took it to Washington; it pleased the Commissioner and Secretary and the Senate and part of the House but the full House threw the agreement away. They took the good words away and put in what they wanted. App. 511.
> GHOST BEAR: I am not going to sign that paper so long as the Great Father will not pay for the land himself. App. 511.
> TWO STRIKE: We don't want to sell the land to some farmers. We want to sell the land to the Great Father, and no one else. App. 486.
> WHITE WASH: If the Great Father had gone ahead and carried out that old agreement, it would have been all right, but we don't care to have anything to do with this new bill. We got nothing out of that other treaty, and many of the Indians have died waiting for their money. I think many of us will die before we get any money out of this land. I want you to go home with this new bill and tell the Great Father that it is not right. You ought to go home and get it fixed. App. 512.
> HOLLOW HORN BEAR: If you take this home and it is not ratified, will you be ashamed to come back here again with another paper and talk to us?
> INSPECTOR McLAUGHLIN: No, I would not as it would not be my fault, but at the same time, I believe that it will not come back for your concurrence in any changes, for the reason that the agreement conforms to the policy of Congress. *The objections to the former agreement was not on account of the price, but to the manner of payment.* App. 521.

10. Hollow Horn Bear is referring to the 1889 treaty which was an uncertain-sum agreement. This reference in the 1903 negotiations to the 1889 treaty, which unquestionably disestablished portions of the Great Sioux Reservation, is another indication that the Tribal members understood that the 1903 agreement would also disestablish a portion of their reservation.

Thus, there is no doubt that the Indians completely understood the new policy of Congress. Homesteaders and not the Government were going to purchase and pay for the land. In the final analysis, the Tribe's fears were not justified as the Tribe ultimately received more money for its land under the 1904 Act than it would have received under the 1901 Agreement.

In spite of their initial disappointment with this congressional approach regarding the method of payment for their land, nevertheless, after the tribe had debated and considered the new proposal, another *cession* agreement was drafted incorporating the uncertain-sum provision. Significantly, the operative language of the new agreement was identical to that of the agreement concluded in 1901:

> The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby *cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted,* situated within the boundaries of Gregory County, South Dakota, described more particularly as follows. App. 531.

By the date of the last council, a majority, although less than three-fourths, of the adult male members of the Rosebud Sioux Tribe formally consented to and signed the new agreement.

In his Report to the Secretary of the Interior, Inspector McLaughlin reiterated the understanding of himself and the Tribe as to the character of the agreement. This mutual understanding is reflected throughout the council transcripts. The Report simply stated:

> I have the honor to report the result of my negotiations with the Indians of the Rosebud Reser-

> vation, South Dakota, for the *cession* of their unallotted land in Gregory County, South Dakota. R. App. 1.

d. Passage of the 1904 Act. Inspector McLaughlin's report and accompanying documents were forwarded to Washington, and on January 9, 1904, the Commissioner of Indian Affairs submitted his report on the progress of the Gregory County opening to the Secretary of the Interior. There was no heated controversy surrounding the 1904 Act as the adoption in the bill of the uncertain-sum provision stilled the 1901 voices of opposition. The bill was presented to the House Committee on Indian Affairs with the recommendation that it be enacted into law. Less than two weeks later the House Committee made the same recommendation via a lengthy report submitted by Congressman Burke. On the third page therein, it is stated in simple and concise terms:

> *There is no question but what the Indians have no use for this land that is proposed to be ceded by this bill; that this tract is only a very small portion of the Rosebud Reservation, and is really only a corner of the reservation, which will be left compact and in a square tract and a reservation about equal in size to the Pine Ridge Reservation, in South Dakota. App. 632.*

This statement coincides with a similar description of the effect of the 1901 bill made by Congressman Burke on the floor of the House. The substance of this description had previously been used to describe the effect of the 1901 certain-sum agreement. *See, 42 supra.* It is highly significant that Congress attributed this same effect of the legislation after the change of the uncertain-sum method of payment had been made.

A statement by Congressman Burke on the floor of the House also confirms that a change in the method of payment was the only difference between the 1901 proposal and the 1904 bill:

> Mr. BURKE. Mr. Speaker, this bill provides for the opening to settlement of 416,000 acres of land, *now*

> a portion of the Rosebud Reservation, in South Dakota, being that portion of the reservation in Gregory County. In 1901 a treaty was entered into with the Rosebud Indians on the part of the United States, by which the Indians agreed to sell to the Government this land for $2.50 per acre. That treaty was transmitted to Congress, and because of the fact that it provided that the Government should pay for the lands outright and then take the chance of the Treasury being reimbursed by disposing of the lands to settlers, it never got further than through the Committee on Indian Affairs, which unanimously reported it favorably. It was never given consideration in the House.
>
> Toward the concluding days of the last session of Congress a new bill was prepared, substantially as this bill now provides, and that bill provided that the lands should be ceded by the Indians to the Government, disposed of to settlers under the provisions of the homestead law, and price to be fixed at $2.50 an acre, as was provided in the original treaty. That bill did not receive consideration in the last Congress because of lack of time, but during the summer that bill was submitted to this tribe of Indians for their acceptance, and forty-eight more than a majority consented to accept the terms of that bill. This bill is substantially the same as the bill which I have just referred to, except that the committee, in view of a suggestion made by the Commissioner of Indian Affairs, in which he said he had no objection to the passage of this bill provided the Indians were insured of as much money as they would have received under the treaty, instead of fixing the price at $2.75, which was provided in the bill submitted to the Indians during the summer, fixed the price at $3 per acre for all lands taken within the first six months and $2.50 for all lands taken thereafter.
>
> It was thought by the committee that this would certainly insure to the Indians as much money as they would have received under the original treaty, and, in my judgment, it insures their receiving considerably more. There is no opposition to the passage of this measure, so far as I know. The Indian Bureau and the Secretary of the Interior have both approved it, providing we fix a price, as we have done, that will insure the Indians as much

> money as they would have received under the original treaty. The Committee on Indian Affairs has considered it fully and at length and has spent several meetings of the full committee considering it. The report of the committee is unanimous. I do not care to occupy the attention of the House in making any extended remarks on the bill, and unless some gentleman desires to ask some questions I will reserve the balance of my time. App. 553-54.

As the above documents indicate, the uncertain-sum provision did not materially alter the substance of the 1901 agreement with respect to its effect on the reservation. The tract was still to be "ceded," the reservation still to be left "compact and in a square tract," and the boundaries still to be diminished, in exactly the same manner as if the uncertain-sum provision had never been adopted.

The format of the bill itself, as introduced by Congressman Burke to the House on January 30, 1904, was as follows:

> A bill to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation and provision to carry the same into effect.
>
> [entire text of *1901* Agreement]
>
> Therefore, be it enacted, etc., that the said agreement be and the same hereby is, accepted, ratified and confirmed as *herein* amended and modified.
>
> [entire Text of 1901 Agreement as amended and modified]
>
> App. 531.

The mere fact that Congress used not only the language of the original 1901 agreement, but the entire text of that agreement is indicative of a continuity of policy. On February 1, 1904, the bill passed the House. Later that month, Congressman Burke, in the course of discussing the Indian Appropriation Act, made a lengthy and complete explanation of the bill for the record and added an appendix to support his explanation.

Congressman Burke began his lengthy explanation with a discussion of the effect of the uncertain-sum provisions:

> Now, Mr. Chairman, what has prompted me to ask the indulgence of this committee at this particular time grows out of the fact that recently this House passed a bill — namely, H.R. 10418 — in relation to the ratification and amendment of a treaty made with the Rosebud Indians in South Dakota, by which the Indians propose to cede to the Government 416,000 acres of land. The bill I refer to was introduced in the House by myself. It was considered by the Committee on Indian Affairs, as the Indian appropriation bill was considered, in several hearings, and was considered and discussed fully in the committee, because the bill proposes what will become, if it should be enacted into law, a new policy in relation to dealing with the Indians in regard to extinguishing their title for lands which they may have in their reservations for which they have no use. . . App. 727.
>
> Mr. Chairman, just a word as to why it was necessary to adopt a new policy in relation to extinguishing Indian title or right of occupancy in reservation lands that were no longer of any use to the Indians, and why it was that the treaty, made with the Rosebud Indians for the cession of that portion of their reservation located in Gregory County, was not ratified by Congress.
>
> Heretofore it has been the policy to enter into a treaty with Indians, the Government stipulating and agreeing to pay in cash a certain price for the land to the Indians. Upon the ratification of a treaty, the land became a part of the public domain, and was disposed of under the homestead laws. It appeared that in many of these treaties a price was paid that was in excess of what the land was actually worth and that instead of the Indians being mistreated it was the Government that was being imposed upon, and it was declared by those in this House who are its leaders that hereafter no Indian reservations could be opened to settlement except on some plan by which the Government would not be obligated to pay the Indian for his right therein, but upon some terms by which the land would be disposed of by the Government and the proceeds paid to the Indians. In the language of our present distinguished Speaker, on the floor of the House in the Fifty-sixth Congress, "When white man pays his money, Indian gets his money."
>
> In 1901 a treaty was made with the Rosebud Indians, signed by more than three fourths of the

male adult Indians, by which they agreed to cede to the United States 416,000 acres of their reservation, being that portion located in Gregory County. The United States in that treaty stipulated to pay to the Indians $2.50 an acre for that land, or, in round numbers, $1,040,000. When that treaty came to the House of Representatives it met with the opposition which I have just stated, and *it became necessary, as I say, to find some other way by which the Indians might dispose of this land and the lands could become a part of the public domain and be occupied, settled upon, cultivated, and improved and made useful* instead of lying there of no value to the Indians, without being used by anybody, unless it might be by some trespasser. App. 731-32.

Congressman Burke then restated the congressional understanding of the holding in *Lone Wolf*:

> In the meantime the Supreme Court of the United States, in the case of Lone Wolf against Hitchcock, decided January 2, 1903, a case where the conditions, so far as the provisions of former treaties were concerned, were exactly identical. Article 12 of the treaty with the Kiowa and Comanche Indians was exactly the same as article 12 with the Sioux Indians in the treaty of 1868 and reaffirmed in the treaty of 1889, by which it was expressly provided that the Indians in the future would not be deprived of any of their reservation lands except upon the consent and approval of three-quarters of the male adults. The Supreme Court, in the case just referred to, Congress having amended a treaty which had been made with the Indians, took up that question and decided it squarely, and perhaps for the first time in the history of the Government. They decided that Congress had the absolute right to legislate with the Indians and for the Indians as the Congress in its judgment might see fit, regardless of any treaty conditions or treaty stiuplations that might have been entered into in the past, and that decision became the law and furnished an opportunity to enact legislation such as the present Rosebud bill does provide, if it is enacted, and we therefore proceeded to amend that treaty so that as the lands were disposed of the money should go into the Treasury and be paid out to the Indians. . . . App. 732-33.

> From the opinions cited, and especially the decision in the Lone Wolf case, it is demonstrated clearly that the Indian is a ward of the nation and that the United States can legislate as the legislative branch may see fit for his best interests. App. 737.

Then Congressman Burke devoted some time to discussing the benefits to the tribal members living on the allotments and the fairness of the price paid.

> It has been claimed that this particular bill is a robbery, and it has been so denominated. I want to say that it provides that the land shall be opened to settlement and what is disposed of during the first six months shall be paid for at the rate of $3 per acre. In this tract there are 452 tracts that have already been selected by the Indians as allotments. In other words, the Indians have gone first and selected as their allotment one-fifth of the tract: and the Indians are just like white men — they have naturally selected the best tracts. That would be natural. So that the 416,000 acres represents only four-fifths of the tract that is located in Gregory County, a part of this reservation. On the north the land is joined by what was formerly a part of the great Sioux Reservation, where land is now open to settlement. . . .
>
> And I maintain that when we put the price at $3 an acre, as we do in that bill, it is not only fair and just, but it is more, Mr. Chairman, in my judgment, than the land is worth to-day, and certainly as much as a man ought to be required to pay who goes there and is required to comply with the provisions of the homestead law, as he will have to do under the terms of this bill. I maintain, Mr. Chairman, that the only question to be determined is the price of the land, and that that is one entirely of judgment, and that in looking out for the interests of the Indians if we see to it that he gets as much as he would have gotten under the treaty which he made we certainly can not be accused of having mistreated him. It is the judgment of every man familiar with the conditions in that section of the country that the land will be disposed of under the provisions and terms of this bill, and that it will be paid for, and that the Indians will receive as much money as they would have received under the original treaty, and probably more. . . .

> . . . *I have no hesitancy in saying that after having taken allotments as they have in the tract affected by the proposed bill, the land left, which is of no value as it is now, should be made a part of the public domain, and upon terms not only fair to the Indian, but upon terms fair and just to the man who may go there to make his home and cultivate it.* . . .
>
> These 452 Indian allotments are practically without value at present, whereas if the adjoining lands are settled upon and improved it will make them valuable, and they can also be rented so as to give the allotments a benefit; and this is a consideration of considerable importance to the Indians having the aforesaid allotments. App. 737, 738, 740.

Finally he concluded:

> . . . You will generally find that the opposition displayed to legislation which is for the interest of the Indians comes from somebody interested in having the Indians obtain just as much money as possible, because the person is desirous of the Indian getting as much money as possible in order that he may get it from him.
>
> To this bill there never would have been any opposition to speak of on the part of the Indians had it not been for the agitation of certain white men residing upon or adjacent to the reservation, who had a selfish interest in the reservation remaining in its present state, possibly to enable them to range their cattle free over the lands and be permitted to continue trespassing. . . .
>
> . . . *upon such terms as are just and fair, to surrender it, that it may become a part of the public domain* and be converted into homes and farms and occupied by people who will contribute to the development and material advancement of the country, and I therefore submit that there is no justification for the opposition that has developed against the Rosebud bill, and that it is a measure that proposes to generously pay the Indians for their right to the lands, and I therefore hope that it may be enacted into law. App. 748-49.

Respondents submit that the Court could not expect to find a more thorough and comprehensive treatment of virtually all the issues presented in this case. This admittedly

lengthy speech by Congressman Burke is in perfect harmony with the complete legislative history of the 1904 Act and undermines the crux of Petitioner's entire position.

On February 4, 1904, Senator Gamble and the Senate Committee of Indian Affairs adopted the entire House report, word for word, and submitted it to accompany the bill to the Senate floor. However, the bill was not presented to the Senate for consideration until April 18, 1904. Again Senator Gamble moved that the Senate proceed to the consideration of the bill. After the entire report was first read by the Secretary, the bill passed without any further discussion.

In accordance with the requirement of the 1904 Act in Section 2 that the land would "be disposed of *under the general provisions of the homestead and townsite laws* of the United States and shall be opened to settlement and entry," President Theodore Roosevelt on May 13, 1904 entered the following Proclamation which made reference to this fact (R. App.6) and declared:

> NOW, THEREFORE, I, THEODORE ROOSEVELT, President of the United States of America, by virtue of the power vested in me by law, do hereby declare and make known that all of the lands so as aforesaid *ceded* by the Sioux Tribe of Indians of the Rosebud Reservation, . . . will . . . in the manner described herein and not otherwise *be opened to entry and settlement and disposition under the general provisions of the homestead and townsite laws of the United States.* R. App. 10-11.[11]

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11. The 1907 and 1910 Rosebud Acts and Proclamations discussed *infra* are equally within the purview of this discussion. In addition, other portions of the Proclamations, such as the following preambles of the 1892 Sisseton-Wahpeton and 1904 Rosebud Proclamations also make clear that, in general, no real distinction can be substantiated among any of these proclamations:

> Whereas, by agreement made with said Indians residing on said reservation, dated December 12, 1889, they conveyed, as set forth in article one thereof, to the United States, all their title and interest in and to all the unallotted lands within the limits of the reservation set apart as aforesaid remaining after the allotments shall have been made . . .
>
> Whereas, it is provided in the act of Congress approved March 3, 1891 (26 U.S. Statutes, pp. 1036-1038, Sec. 30), accepting and ratifying the agreement with said Indians: "That the lands by said agreement ceded, sold, relinquished and conveyed to the United States . . . R. App. 72-73.

The Presidential Proclamations of the 1891 *DeCoteau* Act, the 1889 Great Sioux Act and the 1904 Rosebud Act were proclaimed pursuant to the same general land laws. It is notable that while all three Acts and all three Proclamations specified varying terms and conditions, each of the Acts and each of the Proclamations nevertheless expressly stated that the area would be generally: "*open to settlement . . . under the homestead laws of the United States.*" R. App. 7, 72, 98.[12]

In this respect all three South Dakota Acts and Proclamations are virtually undistinguishable. In each instance the patent received by a homesteader from the United States further manifests this common origin. It was issued "according to the provisions of the Act of Congress of the 24th of April, 1820 entitled 'An Act making further provision for the sale of *Public Lands*,' and the acts supplemented thereto. R. App. 127.

If Congress actually intended that the Rosebud settlers were to be a class apart and distinct from the other South Dakota settlers in the former Great Sioux and former Sisseton-Wahpeton Reservations by leaving intact the

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> Whereas by an agreement between the Sioux tribe of Indians on the Rosebud Reservation, in the State of South Dakota, on the one part, and James McLaughlin, a United States Indian Inspector, on the other part, amended and ratified by act of Congress approved April 23, 1904 (Public No. 148), the said Indian tribe ceded, conveyed, transferred, relinquished, and surrendered, forever and absolutely, without any reservation whatsoever, expressed or implied, unto the United States of America, all their claim, title, and interest of every kind and character in and to the unallotted lands embraced in the following described tract of country now in the State of South Dakota . . . R. App. 6-7.

Compare the complete texts of the 1892 Sisseton-Wahpeton Proclamation, the 1890 Great Sioux Proclamation, and the 1904, 1908 and 1911 Rosebud Proclamations. R. App. 72, 98, 7, 50, 57.

12. The assertion of Petitioner and *amicus* United States that the Rosebud lands were not sold pursuant to the general laws overlooks the plain language of these proclamations and boils down to the mere fact that a slightly higher price was paid under these Acts than the usual homestead price.

The setting of a specific price in a surplus land act does not prevent disestablishment, as is evidenced by the fact that the Sisseton-Wahpeton Act also established a specific price. *DeCoteau*, 442.

original "boundaries" of the Rosebud Reservation for some unascertainable reason, that intent certainly cannot be substantiated in the manner in which the general homestead law was invoked, executed and relied upon by the United States and the Rosebud settlers.

Within this historical perspective, the text of the 1904 Act can now be examined.

e. The Text of the 1904 Act.

The strongest indication of congressional intent to be found within the four corners of the 1904 Act is the operative language of the Act:

> The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby *cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation* now remaining unallotted, situated within the boundaries of Gregory County, South Dakota . . . App. 535.

This language is identical to that contained in Article I of the Agreement negotiated in 1901 between Inspector McLaughlin and the Tribe and contained in the Preamble to the 1904 Act. Congress could hardly have adopted a stronger statement of its intention. Indeed, this Court characterized identical language in the Sisseton-Wahpeton Act as "precisely suited to this purpose." *DeCoteau, supra* 445.

In addition to the above operative language, the school lands provision of Article II has become a focal point of discussion in both the briefs of the parties and the decisions below. Article II of the 1904 Act contained the proviso that the United States would dispose of the land ceded to it by the Tribe:

> . . . except sections sixteen and thirty-six, or an equivalent of two sections in each township, and to pay to said Indians the proceeds derived from the sale of said lands; and also the United States stipulates and agrees to pay for sections sixteen and thirty-six, or an equivalent of two sections in each township, two dollars and fifty cents per acre. App. 536.

This "school lands provisions" was a direct carryover from an amendment to the original 1901 certain-sum cession agreement.[13] That amendment was offered on the first day the 1901 Agreement was presented on the floor of the Senate for ratification. As Senator Gamble then explained to the Senate:

> Under the provision of the enabling act authorizing the admission of the State of South Dakota into the Union, sections 16 and 36 in every township were reserved for school purposes. *This provision did not apply to permanent Indian reservations, but became operative when the Indian title was extinguished and the lands restored to and became a part of the public domain,* this would withdraw about 29,000 acres of these lands and would save 387,000 acres to be opened to settlement, which would be affected by the proposed amendment. App. 64.

The provision of the enabling act to which Senator Gamble referred provided:

> Nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act *until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.* Act of February 22, 1889, 25 Stat. 676.

This amendment was immediately agreed to and passed without discussion.

After the uncertain-sum provision was adopted, the school lands provision referred to above was retained in the 1904 legislation. In the discussion on the House floor when Congressman Burke presented the bill on January 30, 1904 the following exchange took place:

> Mr. FINLEY: Mr. Speaker, I observe that in section 4, reserving school lands, it is provided that the Government pay for those lands. Is that the usual appropriation that is put in all bills of this character?

13. The same provision was also contained in the 1889 Great Sioux Act and the 1891 Sisseton-Wahpeton Act discussed, *supra*.

> Mr. BURKE: I am glad the gentleman has asked me that question. I would state that under the enabling act under which the State of South Dakota was admitted to the Union it was provided that sections 16 and 36 in said State should be reserved for the use of the common schools of that State, *and it further provided that as to the lands within an Indian reservation the provisions of that grant would not become operative until the reservation was extinguished and the land restored to the public domain. That enabling act was passed by Congress on the 22d day of February, 1889. In March of that same year Congress ratified a treaty with the Sioux Indians in South Dakota for the cession of something like ten or eleven millions of acres of land, and made an express appropriation, in accordance with provisions of the enabling act, to pay out-right out of the Treasury the money for sections 16 and 36 of that land at the price stipulated for in the [1889] treaty.*
> Mr. FINLEY: Then, as I understand the gentleman, he bases the wisdom or equity for this provision upon the enabling act admitting South Dakota into the Union?
> Mr. BURKE: Yes.
> Mr. FINLEY: And not otherwise?
> Mr. BURKE: No. App. 554-55.

Precisely the same underlying reason for the inclusion of this school land provision in the final act, namely that the act would extinguish that portion of the reservation and hence make operative the enabling act, is also given in all of the House and Senate Reports:

> The bill also provides that sections 16 and 36, or the equivalent of two sections in every township, shall be ceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and an appropriation of $90,000 is made for this purpose. *This provision is in conformity with the guarantee given to the State of South Dakota by Congress in the enabling act,* which provided that any reservations open to settlement subsequent to the admission of the State into the Union, that sections 16 and 36 would be reserved and ceded to the State for school purposes. App. 434, 452.

> Section 4 of the bill provides that sections 16 and 36, or the equivalent of two sections in every township, shall be ceded to the State of South Dakota for school purposes and paid for by the United States at $2.50 per acre, and section 5 provides for an appropriation of $90,000 for this purpose. *This is in conformity with the guaranty given to the State of South Dakota by Congress in the enabling act,* which provides that in any reservations opened to settlement subsequent to the admission of the State into the Union sections 16 and 36 would be reserved and ceded to the State for school purposes. App. 632, 681.

The fact that the 1904 Act specifically referred to sections 16 and 36 in its granting of school lands led the district court to conclude:

> *Here is an unequivocal statement and corresponding action by the Senate of the United States premised solely and only upon the fact that the title of the Indians was extinguished and the lands restored to public domain.* It is a strong indication by Congress that its intention was to diminish the size of the Rosebud Reservation. The amendment was adopted without discussion, again buttressing the impression that the diminution of the Rosebud Reservation was a premise upon which all members of Congress acted when enacting the various Indian acts. Pet. App. 81-82.

and the court of appeals to concur:

> In the light of the above there can be no reasonable doubt that it was the congressional intent to extinguish the reservation in Gregory County. The Tribe argues that the school lands grant in the South Dakota enabling act would operate automatically upon the extinguishment of a reservation and that since Congress thought it necessary in the 1904 Act to grant school lands to South Dakota, the reservation must not have been extinguished. But we cannot ignore the legislative history outlined above from which it is clear that Congress included the provision to implement the grant in the enabling act and for no other reason. *Thus the action of Congress in passing section 4 of the 1904 Act was premised solely upon an understanding that the reservation would be extinguished and is persuasive that such is the effect of the Act.* Pet. App. 30-31.

Another provision of the 1904 Act premised upon a congressional understanding of disestablishment is that portion of Section 2 that provides:

> And provided further, that all lands herein ceded and opened to settlement under this act, remaining undisposed at the expiration of four years from the taking effect of this act, shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than 640 acres to any one purchaser. App. 539.

Here, as in the 1889 uncertain-sum disestablishment Act where the United States itself agreed to purchase all unentered land after ten years, Congress again adopted a plan whereby the tribal interest in surplus and remaining undisposed lands would be effectively eliminated after a stated period of years.

When viewed from the proper historical perspective, set forth above, the entire text of the 1904 Act demonstrates Congress' intent to disestablish the Rosebud Reservation in Gregory County. Other provisions cited by Petitioner and the various *amici* do not in any way lessen the effect of this Act as intended by Congress.

f. The 1905 Extension Statute. This Court remarked in *Mattz, supra,* that "although subsequent legislation usually is not entitled to much weight in construing earlier statutes (citation omitted) *it is not always without significance.*" 392 U.S. 157, 170. Respondents submit that very shortly after the passage of the Act of April 23, 1904, 33 Stat. 254, Congress enacted a statute which provides the classic instance where subsequent legislation can greatly assist the search for congressional intent. In 1905, a bill was proposed which would extend the time of payment for settlers establishing their residence in Gregory County. This provision was addressed identically in both a Senate and House report:

> The Committee on Public Lands, to whom was referred the bill (S. 5799) to provide for the extention of time within which homestead settlers may

> establish their residence upon certain lands which *were heretofore a part of the Rosebud Indian Reservation* within the limits of Gregory County, S. Dak., having had the same under consideration, beg leave to report the bill back with the recommendation that it be amended, and that as amended to do pass. . . . R. App. 17, 19-20.
>
> The portion of the Rosebud Indian Reservation which was subject to the legislation provided by the act of April 23, 1904, was thrown open for settlement by the proclamation of the President of the United States under date of May 13, 1904. . . . R. App. 17, 19-20.

Senator Gamble explained the purpose of the bill to the Senate in January of 1905:

> Mr. GAMBLE. I ask unanimous consent for the present consideration of the bill (S. 5799) to provide for the extension of time within which homestead settlers may establish their residence upon certain lands *which were heretofore a part of the Rosebud Indian Reservation within the limits of Gregory County, S. Dak.* . . .

The title and text of the Act provided:

> *An act to provide for the extension of time within which homestead settlers may establish their residence upon certain lands which were heretofore a part of the Rosebud Indian Reservation* within the limits of Gregory County, South Dakota, . . .
>
> Be it enacted . . ., That the homestead settlers on the lands which were *heretofore a part of the Rosebud Indian Reservation* within the limits of Gregory County, South Dakota, opened under 'An Act to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation, in South Dakota, and making appropriation and provisions to carry the same into effect,' approved April twenty-third, nineteen hundred and four . . . be, and they are hereby, granted and extension of time in which to establish their residence upon the lands so opened. . . . App. 763-64.

A contemporary communication from the Department of the Interior confirms this understanding:

> Instructions.

> Department of the Interior
> General Land Office
> Washington, D.C., Feb. 9, 1905.
>
> Register and Receiver,
>
> Chamberlain, South Dakota, . . .
>
> Gentlemen: The Act of February 7, 1905, provides —
>
> That the homestead settlers on the lands which were *heretofore a part of the Rosebud Indian Reservation* within the limits of Gregory County, South Dakota, opened under an act entitled "an Act to ratify and amend an agreement with the Sioux tribe of Indians of the Rosebud Reservation. . . ." be, and they are hereby, granted an extension of time in which to establish their residence upon the lands so opened and filed upon until the first day of May, anno Domini nineteen hundred and five. . . .
>
> You will see that as to lands in the *former* Rosebud Reservation,. . . . this act is given effect in your office as to all entries made of such lands prior to November 1, 1904.
>
> W. A. Richards, Commissioner
>
> Approved: E. A. Hitchcock,
> Secretary
> 33 L.D. 408 (1905).

It is the contention of Respondents that the 1905 extension statute is unmistakable evidence that Congress considered the reservation status of Gregory County to have been disestablished by the 1904 Act.[14]

2. The Act of March 2, 1907: Tripp County.

The discussion of the 1907 Act, as well as the 1910 Act, is less detailed than that of the 1904 Act, primarily because the later acts were less controversial than the first one. Also, the continuity which runs through the three Rosebud Acts makes a very detailed account of the 1907 Act redundant. Congressional policy and intent on all key issues was es-

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14. *See*, 92-116 for a representative cross-section of similar documentation which confirms that Congress intended the 1904 Act to disestablish this portion of the Rosebud Reservation.

tablished between 1901 and 1904 and the passage of the 1907 Act was largely a matter of routine. It should also be noted that Petitioner centers his arguments on the legislative intent surrounding the 1904 Act and concedes that the construction of that Act is determinative for all three Acts in question.

a. The 1907 Agreement is Negotiated.

By 1906, nearly all of the land made available by the Gregory cession had been taken, and pressure was being applied in Washington for another opening. In the debate on the Indian Appropriation Act in March of 1906, Congressman Burke made reference to the continued role of Section 5 of the General Allotment Act as incorporated in Section 12 of the 1889 Act.

> I desire to call attention to a provision of the allotment law to which I have referred substantiating what I have said as to what shall be done with moneys that may be received from the sale of the unused portions of Indian reservations. In *section 5* of that law I read this paragraph:
>
> > And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians to whom such reservations belong, and the same, with interest thereon at 3 per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof.
>
> Mr. Chairman, in the bill dividing the great Sioux Reservation in South Dakota into separate reservations that *identical language was incorporated, showing that it was the policy and the intention of Congress when the original allotment law was passed, after giving to an individual Indian a certain tract of land in the form of an allotment, to have the balance of the lands which constituted the reservation sold and disposed of and the proceeds put in the Treasury for the support, education, and civilization of those Indians.* . . . R. App. 26-27.

In early June, Senator Gamble requested that the Secretary of Interior detail an inspector to enter into

negotiations with the Rosebud Indians for a "cession of the surplus unallotted land in Tripp County." On November 22, 1906, he was joined by Representative Burke, who contacted the Office of Indian Affairs to inform them that he had recently visited the Rosebud Reservation to gather information for a bill he was preparing dealing with the "sale of that portion of the reservation located in Tripp County." App. 936-937. The next day, Senator Gamble renewed his request and on the 26th of November, the Assistant Secretary of Interior ordered the Commissioner of Indian Affairs to prepare the instructions for Inspector McLaughlin.

If the Secretary had selected any inspector other than McLaughlin, these instructions could have been an excellent source of information. However, McLaughlin was merely told, "you are familiar with the situation there and for this reason it is not deemed necessary to give instructions in detail for conducting the negotiations." The brief instructions state in part:

> The land *ceded* should be disposed of under the general provisions of the homestead and townsite laws of the United States . . . . The following would seem to be fair terms, similar to those in the disposal of the *ceded* lands in Gregory County . . . . It is suggested that the agreement provided that the Indians shall have the benefit of whatever can be realized from the sale of lands for townsite purposes, and should authorize the Secretary of the Interior to reserve from the *ceded lands* such tracts . . . . [T]he unallotted and unreserved lands, if any, in sections 16 and 36 in the *cession* should be reserved for the use of the common schools . . . . App. 937-938.

The disestablishment policy of Section 5 of the General Allotment Act through Section 12 of the 1889 Act was still in full force and effect. As far as the Department of the Interior was concerned, this was to be simply another "cession" of a "tract" which extinguished the reservation and restored land to the public domain.

Inspector McLaughlin, after receiving his instructions on December 5, 1906, departed immediately for the Rosebud

Reservation. At the first day of the council held on December 14, 1906, he stated the purpose of his visit:

> I am here under orders of the Secretary of the Interior to submit to you a proposition for the *cession* of your surplus unallotted land in Tripp County .... The Department desires that you *cede* these unallotted lands, to be disposed of under the general provisions of the homestead and townsite laws of the United States .... App. 766-67.

The Tribe knew why Inspector McLaughlin had returned to the Rosebud. Copies of the bill which Representative Burke introduced on December 3, 1906, had preceded his arrival and had been circulated among them. Inspector McLaughlin was unaware of this, which contributed in part to his initial difficulty in negotiating with the Tribe.

The entire council transcript consists of some ninety pages of negotiations. There are two specific areas which merit discussion. The first is the confirmation of the Tribe's understanding that the 1904 Act had disestablished a portion of their reservation. On the first day of the council, Inspector McLaughlin was drawn into a discussion dealing with the railroads which were being built near the reservation:

> INSPECTOR McLAUGHLIN: In regard to the railroad running north of White River, that road is being built across what is called the ceded portion. The Indians of the entire Great Sioux Reservation ceded that portion of the reservation in 1889, by what you call the Crook Treaty, the act of March 2, 1889. That land has all been surveyed and you have received credit on the books of the Treasury, $1.25 per acre for the land taken the first three years after it was opened, 75c per acre for the next two years, and 50c per acre for all the rest excepting two sections in each township (school lands) for which $1.25 per acre was credited to you . . . *There is no railroad running over any portion of the Rosebud Reservation, none within the boundaries of your reservation. That railroad in Gregory County has not yet come across your reservation, you would receive pay for its right of way. Any of the Indians who may live in Gregory County whose allotments have been crossed by that railroad, have, or will receive pay for the privilege of crossing their allotments, so you need not worry about that, my friends.* App. 770.

In other words, although the railroad had been extended through the "old" eastern boundary of the reservation and nearly the entire area opened by the 1904 Act including some Indian allotments therein, it had not yet been extended through the "new" eastern boundary of the recently diminished reservation. The area opened by the 1904 Act was simply no longer considered to be within the exterior boundaries of the reservation any more than the area ceded by the 1889 Act over which the first railroad ran.

Additional support for this position can be found throughout the negotiations. The Indians continually referred to Tripp County as the *eastern* part of their reservation. For example, High Pipe stated "The best land we have is the *eastern* part of our reservation, Tripp County." When one recalls the continual reference to Gregory County as the *eastern* part of the reservation in the earlier negotiations, these remarks assume an added degree of significance.

The other important area concerns the general continuity reflected in the negotiations. The proposed legislation of 1906 was not only treated in precisely the same manner but was also continually compared with the 1904 Act opening Gregory County. Numerous times the acts were referred to as being, in effect, one and the same. Inspector McLaughlin stated, "You must bear in mind that this agreement provides for the opening of Tripp County the same as your Gregory County lands are being disposed of." App. 799. This is also the manner in which the proposed legislation was later treated in Washington.

At the conclusion of many days of council, another cession agreement incorporating the uncertain-sum provision was drafted. The operative language of the 1906 Agreement was also identical to that of the original certain-sum agreement concluded in 1901.

> The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration herein named and in the manner hereinafter provided, do hereby *cede, grant, and relinquish to the United States all claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation* lying south of Big White River and east of range 25 west, of the sixth principle meridian in South Dakota, except such portions thereof as have been, or may hereafter be, allotted to Indians. App. 908.

Article II of the agreement provides for the uncertain-sum method of payment:

> In consideration of the lands *ceded and relinquished* by Article I of this agreement, the U.S. stipulates and agrees to dispose of the same, as hereinafter provided, under the provisions of the homestead and townsite laws, or by sale for cash, and shall be opened . . . App. 909.

As in 1903, a majority of the adult male members of the Rosebud Sioux Tribe again formally consented to and signed the new agreement. The uncertain-sum policy was apparently not seen as inconsistent with the "cede, grant, and relinquish to the United States all right, title and interest in" language of Article I by the Secretary of the Interior, the Office of Indian Affairs, Inspector McLaughlin or the Tribe in this instance, any more than it had been in 1889 or 1904.

b. Passage of the 1907 Act.

Although the negotiations ended on January 21, 1907, Inspector McLaughlin's final report was not completed until February 12, 1907. On February 14, 1907, the Office of Indian Affairs, which had been withholding formal approval of the pending legislation until the receipt of his report, recommended that the agreement be ratified. Later that same day, the Secretary of the Interior added departmental approval and the bill was favorably reported out of committee by Representative Burke — a remarkable example of legislative efficiency. However, this display of efficiency by the House resulted in the failure of the 1907 Act to recite and

ratify the exact agreement negotiated by McLaughlin and approved by a majority of the Tribe, as had been the case with the 1904 Act.

The Office of Indian Affairs and the Secretary of the Interior had attempted to make legislation conform in every respect with the expectations of the Tribe. Both had recommended that the agreement be ratified with only those changes necessary to make it effective. App. 906, 923. Accordingly on February 18, 1907, the Senate Committee on Indian Affairs concurred and Senate Report No. 6831 was submitted with the agreement basically intact and incorporated in the body of the bill. App. 952.

By this time, however, the House had already debated and passed a second Burke bill which incorporated substantially the terms of the agreement but without reciting it in the body of the bill. Senator Gamble immediately steered this second House bill through the Senate and it passed without debate, but with two minor amendments. The House refused to accept these amendments immediately and passage of the bill was delayed until a compromise could be agreed upon. By February 27, 1907, a conference committee resolved the difficulties when the Senate receded from its amendments, and the bill became law on March 2, 1907.

Thus, except for the fact that a version of the bill which did not recite the agreement itself had already passed the House by the time the Senate was ready to consider its version of the bill which did recite the agreement the 1907 Act could very well have ended up in the same exact format as the 1904 Gregory County Act — a form containing the exact text of the 1906 cession agreement. The reason for Burke's failure to include the full text of the 1906 agreement was stated in an exchange with Congressman Fitzgerald on the House floor:

> Mr. FITZGERALD. The Commissioner of Indian Affairs recommended that all after the enacting clause be stricken out and the agreement be inserted and ratified. That has not been done, and that has not been the practice for several years. I wish to ask this question: Have the provisions of the

treaty been inserted in this bill?
Mr. BURKE. I may say to the gentleman that they have been. App. 884.[15]

Despite the speedy passage of the 1907 Act, there is a sufficient legislative history to make clear Congress' understanding that this Act further diminished the Rosebud Reservation. First and foremost, both the House and Senate Committee Reports explained the purpose of the bill in identical language:

> The purpose of this bill is to authorize the opening and sale of that portion of the Rosebud Reservation in South Dakota known as Tripp County, and it affects *all that portion of the reservation east* of range 25 of the fifth principal meridian south of the Big White River, and embraces about 1,000,000 acres.
>
> In the second session of the Fifty-eighth Congress a law was passed authorizing a sale of so much of this same reservation as *was* located in Gregory County, the tract affected being about one-half the area embraced in the tract affected by the pending bill and lying immediately adjoining and east of Tripp County. App. 900, 916.

The description of Tripp County as *"all* of that portion of the reservation east of Range 25" precludes any consideration of Gregory County as a part of the Reservation, as does the reference that the reservation "was" located in Gregory County. Moreover, the 1907 Act was obviously viewed as simply a further step in the process and therefore aptly described as a "sale" of another "portion" of the reservation.

Upon reviewing these Reports the circuit court concluded:

> These materials concerning the description of the tract affected by the 1907 Act not only provide a contemporaneous and authoritative construction of the 1904 Act which supports our interpretation thereof, but also directly indicate, in light of the continuity discussed above, that the 1907 Act was similarly intended to further constrict the boundaries of the Rosebud Reservation. Pet. App. 41.

Additionally, the Senate Report earlier described the bill in the same manner.

> . . .cede, grant, and relinquish to the United States all claim, right, title, and interest in and to *all that part of the* Rosebud Indian Reservation lying south of Big White River and *east* . . . App. 924.

The remarks of Representative Burke, who presented the bill on the floor of the House on February 16, 1907, left no doubt as to either the effect of this bill or its connection with the 1904 bill.

> Mr. Speaker, the bill has the unanimous report of the Committee on Indian Affairs, in which committee it was very carefully considered. The bill is substantially in accordance with an agreement which has just been made with the Indians, signed by forty-two more than a majority of the male Indians over the age of 18 years. It is in line with the recent bills that have been passed affecting the sale of the Indian reservations. It is along the line of the bill which passed in the Fifty-eighth Congress for the sale of that portion of this same reservation that is located in Gregory County. The maximum price of the land in that bill was fixed at $4 per acre, while the maximum price in this bill is $6 per acre.
>
> The Indians, as I have stated before, have agreed to the disposition of it under the terms of the bill. They will have left, after this land is disposed of, *a reservation that is substantially 50 miles square*, and there are only 5,000 Indians. App. 882-83.

As the District Court noted:

> It can be seen, upon examining a map, that the quotation '50 miles square' referred to in the quote relates approximately to the size of the reservation minus Gregory, Tripp and Lyman Counties. Mellette and Todd County make up a generally square area, roughly 50 miles on a side. Again, one can see the continuous policy with relation to the

15. When Congressman Burke earlier addressed the House of Representatives on the annual Indian Appropriation Act for the year 1907 noted *supra*, he clarified the reason for the "practice":

> Mr. FITZGERALD. Mr. Chairman, while many agreements have been negotiated, none have been ratified, practically none, in the *form* in which they were negotiated. And that is what confuses the gentleman from Texas [Mr. Stephens].
>
> Mr. BURKE of South Dakota. Mr. Chairman, it is true that since the decision by the Supreme Court in what is known as the "Lone Wolf case" treaties or agreements have not been ratified, but *legislation has been enacted along the line of agreements substantially complying therewith*. R. App.

> Rosebud Indian Reservation and opening the reservation, diminishing the reservaton, and extinguishing the reservation nature of the lands concerned. Pet. App. 90.

The 1907 Act became law on March 2, 1907 and like the 1904 Act and the Sisseton-Wahpeton Act it was a surplus land statute enacted pursuant to section 5 of the General Allotment Act as incorporated in section 12 of the 1889 Act.

Again, in accordance with the requirement in the 1907 Act in Section 2 that the land would be "disposed of by proclamation, *under the general provisions of the homestead and townsite laws* of the United States, and shall be opened to settlement and entry," President Theodore Roosevelt on August 24, 1908, entered the following Proclamation which made reference to this fact (R. App. 50-51) and declared:

> Now, therefore, I, Theodore Roosevelt, President of the United States, by virtue of the power and authority vested in me by said Act of Congress, do hereby prescribe, proclaim and make known that all of said lands . . . will *be opened to settlement and entry, under the general provisions of the homestead laws.* . . . R. App. 50-51.[16]

The next day, the Department of the Interior made clear its understanding of the Act and the Proclamation when it referred to the opened area in an instruction to the Commissioner of the General Land Office in this language:

> Department of the Interior
> Washington, D.C., Aug. 25, 1908.
>
> The Commissioner of the General Land Office.
>
> Sir: Pursuant to the proclamation of the President issued August 24, 1908, for the opening to settlement, occupation and entry to certain lands *formerly* within the Rosebud Indian Reservation in the State of South Dakota, under the act of Congress approved March 2, 1907 (34 Stat., 1230).
>
> . . .
>
> Very Respectfully,
> Jesse E. Wilson,
> Acting Secretary

16. *See*, the general homestead laws discussion of the 1904 Proclamation at 63, *supra*.

c. The Text of the 1907 Act. As explained above, the 1907 Act on its face does not recite the text of the 1906 Agreement and as a result the operative language of the Act does not use the "cede, surrender, grant and convey" terminology. Nevertheless, the operative language of the Act was equally suited to effect the same result. It provided:

> *To sell or dispose of all that portion of the Rosebud Indian Reservation* in South Dakota lying south of the Big White River and east of range 25 west of the sixth principle meridian, except such portions thereof as have been, or hereafter be, allotted to Indians. App. 869.

Congress saw no critical distinction between the "sell or dispose" language of the 1907 Act and the "cede, surrender, grant and convey" language of the 1904 Act. As the legislative history and surrounding circumstances make apparent, the result was to be the same in both instances — the disestablishment of a portion of the Rosebud Reservation.

Sections 6 and 7 of the 1907 Act again specifically provided that certain school lands were to be granted to the state and paid for by the Federal Government. The members of the House and Senate, who were not as familiar with the previous Rosebud legislation, were consistently given the same explanation for this provision. A portion of the reservation, Tripp County, would be disestablished by the 1907 Act, as portions thereof had been disestablished before, and a section of the enabling act required in such cases that school land then be granted to the state. When Congressman Burke presented the bill to the House the following debate took place:

> Mr. FINLEY. Does not the gentleman think that the State of South Dakota should have land for school purposes, as is provided in the bill, and that the Government should pay for the land?
> Mr. BURKE. I will answer that question by stating that in at least *six* different instances since South Dakota was admitted into the Union Congress has made an appropriation and paid for the school sections under the [Enabling Act] guaranty that was given to the State when we came into the Union.

Mr. FINLEY. Why is that where certain sections have been allotted or patented the Government is called upon to pay for sections 16 and 36?
Mr. BURKE. That refers to sections that have been allotted to the Indians, and it has always been the custom where school sections have been allotted to give to the State in lieu of such sections other sections, not exceeding two in any township.
Mr. FINLEY. Is it true that some of these lands have been allotted to the Indians?
Mr. BURKE. It is true that a portion of the lands have been allotted to the Indians.
Mr. FINLEY. Does the gentleman think the Government should be called upon to pay to the State of South Dakota for lands allotted to the Indians? Doesn't the land belong to the Indians? I ask the gentleman if that practice has been the usual one?
Mr. BURKE. We have heretofore appropriated to pay for sections 16 and 36 in every township, or where they had been taken to pay for a section in lieu thereof. Mr. FINLEY. Has that been the rule where lands are allotted to Indians?
Mr. BURKE. Yes; that has been the rule and was the rule in the former Rosebud bill which passed the Fifty-eighth Congress, and is exactly in line with this provision, and the price is the same. App. 883-84.

Although Congressman Burke could have explained the necessity for the inclusion of such a provision more completely, as he had done in other instances, an examination of the House and Senate reports reveals why such a detailed statement in this instance would have been superfluous. One entire page of each of these reports is devoted to this very question:

> Section 6 of the bill reserves sections 16 and 36 in each township for the use of the common schools, and grants the same to the State of South Dakota, and section 7 make an appropriation to pay for the same at $2.50 per acre. This is following the *precedents* which have heretofore been established in the *opening* of other reservations in South Dakota, and is based upon section 10 of the act of Congress admitting South Dakota into the Union, approved February 22, 1889. Said section is as follows:

> SEC. 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any part thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time be subject to the grants nor indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act *until the reservation shall have been extinguished and such lands restored to and become a part of the public domain.*

The following are the precedents:

By section 30 of the act opening and dividing the *Great Sioux Reservation*, sections 16 and 36 were granted to the State, and an appropriation of $1.25 per acre was made to pay for same. Act approved March 2, 1889. (25 Stat. L. 898.)

By section 30, act approved March 3, 1891, opening the *Sisseton and Wahpeton Reservation*, the school sections were ceded to the State and an appropriation made, and the same were paid for at $2.50 per acre. (26 Stat. L. 1039.)

By act of August 15, 1894, opening the *Yankton Reservation*, the school sections were ceded to the State and paid for at $3.75 per acre. (28 Stat. L. 313.)

Act providing for sale of *Rosebud Reservation, in Gregory County*, school sections were ceded and paid for at $2.50 per acre, and act authorizing sale of a portion of the Lower Brule Reservaton, first session of the (Fifty-ninth) Congress, school sections were ceded to the State and paid for at $1.25 per acre. App. 904.-05, 920-21.

Contrary to Petitioner's position, there can be no question that Congress viewed the school land provision of the 1907 Act as implementing Section 10 of the South Dakota Enabling Act. Moreover, all of the pre-Rosebud acts cited as precedents in the above reports, whether certain-sum or uncertain-sum, unquestionably disestablished portions of reservations. Because each Act thus made operative the guarantee of the enabling act conditioned on this disestablishment prerequisite, each act contained a provision for an identical school land grant. The inclusion of the same grant in the Rosebud Acts for the same stated reasons is positive evidence of disestablishment.

Petitioner has also argued that the allotment provision of Section 2 of the 1907 Act negates a congressional intent to disestablish Tripp County as part of the Rosebud Reservation. Petitioner cites no legislative history to support this assertion, but merely gives his own interpretation of the provision. Section 2 of the 1907 Act reads as follows:

> . . . Provided, that prior to said proclamation, the Secretary of the Interior, in his discretion, may permit Indians who have an allotment within the Rosebud Reservation to relinquish such allotments and to receive in lieu thereof an allotment anywhere within said reservation . . . App. 870.

This provision as compared to the explicit language of the 1910 Act is somewhat awkward because of the special circumstances which then existed on the Rosebud Reservation. As the Commissioner of Indian Affairs explained to Inspector McLaughlin in his instructions:

> The Office is in receipt of a communication of November 22, from Hon. Charles H. Burke, wherein he says that he recently visited the Rosebud Reservation for the purpose of gaining information with a view to preparing a bill for the sale of that part of the reservation located in Tripp County; that he found that a large number of Indians had taken allotments in the *western and southwestern parts of the reserve*, and on lands which are now, and always will be, worthless, being nothing but sand hills; that the Indians who have allotments in the reservation elsewhere than in Tripp County should be permitted, in the discretion of the Secretary of the Interior, to relinquish them and to take allotments in lieu thereof in some other part of the reservation, including Tripp County; App. 936-37.

At the time of these instructions, when the bill was drafted and when the House and Senate Reports were prepared, Tripp County was still part of the Rosebud Reservation. For purposes of allotment, it would continue to be part of the reservaton until the act was passed and the lands in Tripp County proclaimed opened to settlement. Thus, the special allotment provision would allow those members of the Tribe with allotments in the southwestern (Todd County) and western (Mellette County) portions of the reservation to reselect allotments on the better land in Tripp County before the opening. If for any reason, any Tripp County allottee did not desire to remain so situated, he also could still reselect anywhere within the reservation. Significantly, Gregory County, the eastern part of the original reservation was not within, directly or indirectly, the purview of this section. In 1907 Gregory County was not a part of the Rosebud Reservation. In light of the special reasons for the wording of the 1907 allotment section, the language of that section is consistent with Congress' intent to disestablish the portion of the Rosebud Reservation contained in Tripp County.

As in the 1904 Act, Section 3 of the 1907 Act provided the means by which all tribal interest in undisposed lands would be eliminated after a stated period of years:

> That all lands remaining undisposed of at the expiration of four years from the opening of the said lands to entry shall be sold to the highest bidder for cash at not less than two dollars and fifty cents per acre, under rules and regulations to be prescribed by the Secretary of the Interior, and that any lands remaining unsold after the said lands have been opened to entry for seven years may be sold to the highest bidder for cash, without regard to the above minimum limit of price. App. 871.

Here, as in the 1889 uncertain-sum disestablishment Act

which also contained a similar provision. Congress again insured that the ultimate disposition of the lands would be consistent with reservation disestablishment. The school lands provision and the operative language of the 1907 Act are clearly consistent with that result.

3. The Act of May 30, 1910: Mellette County

a. The Initial Attempts to Open Mellette County.

The familiar forces continued to work with exceptional speed on the Rosebud Reservation. The ink had not yet dried on the proclamation opening Tripp County when Senator Gamble began preparing to further reduce the Rosebud Reservation. In early December, 1908, he submitted a copy of a bill to that effect to the Commissioner of Indian Affairs requesting that Inspector McLaughlin be detailed to the Rosebud Reservation for the purpose of "bringing the bill to the attention of the Indians." On January 26, 1909, Senator Gamble was notified that Inspector McLaughlin would not be available for three or four months. In this same letter, the Commissioner noted that:

> *[t]he Rosebud Reservation has been reduced very rapidly during the last few years,* and intimations have reached this Deprtment from trustworthy sources that there is danger that the land available for allotment may be exhausted if too large a reduction is made at this time. App. 999.

On January 29, 1909, Senator Gamble submitted this report on behalf of the Senate Committee on Indian Affairs:

> The *present* area of the Rosebud Indian Reservation aggregates 1,800,000 acres. The land proposed to be open to settlement under the provisions of this bill embrace an area of about 900,000 acres . . . It was at first contemplated to submit this bill, through an Indian Inspector, for the consideration of the Rosebud Indians, but the Inspector, who for a number of years has had that especial work in charge, is otherwise occupied and has been unable to take it up, and it is felt by the committee that the provisions of the bill are fair and just to the Indians in all respects, and it would delay the consideration of the matter unduly if action were withheld for that purpose, and the measure could not receive consideration during the present session of Congress.
>
> The reservation is *yet* large, and in the judgment of your committee, the surplus and unallotted lands are unnecessary for the use of the Indians. . . . It also provides that the Secretary of the Interior in his discretion, may permit Indians who have an allotment *within the area proposed to be opened to relinquish such allotments and receive in lieu thereof allotments anywhere within the reservation proposed to be diminished.* App. 995-96.

Although the bill was introduced on the floor of the Senate, it was never actually considered. At one point, however, Senator Gamble did explain the bill:

> The Rosebud Indians have a reservation of nearly 2,000,000 acres. A bill has been introduced and favorably reported upon by the Interior Department, and a unanimous report made from the Committee on Indian Affairs, under which it is proposed to open about *one-half* of the reservation to settlement. . . . With this reservation standing unopened to settlement, it is retarding the development and growth of that section of the State. App. 993-94.

However, the bill was not acted upon unilaterally by Congress. Instead, Inspector McLaughlin was instructed on April 2, 1909, to present the matter to the Indians for their consideration.

b. The 1909 Negotiations.

McLaughlin's meetings with the Tribe were more abbreviated in connection with the Mellette County opening than in the past. On the reservation, however, Inspector McLaughlin still presented the proposition in familiar terms:

> INSPECTOR McLAUGHLIN. My friends, this is the fifth time that I have *negotiated* with you for lands, and I have been here so often with respect to the *cession* of lands, that my friend High Pipe, has given me the name of 'the man who bothers his friends for more land.' App. 1020.

The other members of the Tribe viewed the proceedings in the same light as High Pipe. This was seen as another cession

of land. In the first meeting, which was conducted merely "for the purpose of preparing their minds" for a formal council, the proposed opening was strenuously opposed. The opposition soon waivered and by the time a formal council was convened, the Indians had crystallized their specific objections and the bill was given limited approval. The original proposal included the opening of some townships within Todd County, then called Meyer County, along the Todd and Tripp County border. The exclusion of these townships from the opening removed the primary tribal objection.

The disestablishment question itself was again mentioned in an indirect manner. For example, the Indians continually referred to those townships located just west of Tripp County as the new "*eastern* part of our reservation." App. at 1023. In addition, they also referred to that part of the opening north of the 10th parallel as the entire "north part of our reservation." App. at 1028. Clearly, the Tribe no longer considered Gregory or Tripp County as part of the Rosebud Reservation.

Inspector McLaughlin dealt directly with the disestablishment question in this manner:

> The opening of that part of your reservation will not only increase the value of the lands in that tract, but will also add a great deal to the value of the lands in your *diminished* reservation. App. 1031.

The Tribe and the Inspector had the same understanding, i.e., the Act disestablished portions of the reservation.

McLaughlin had no reason to draft a formal cession agreement on this occasion since such express agreements were no longer viewed as necessary by either Congress or the Department of the Interior. Nevertheless, by a letter dated April 29, 1909, Inspector McLaughlin still reported to the Commissioner of Indian Affairs that the Indians expressed "their concurrence in the opening of the northern strip, provided the two tiers of townships in the eastern part of Meyer County remain a part of the *diminished reservation*." R. App. 56. Since the Commissioner had taken essentially this same position,

these townships were deleted from the area proposed to be opened and a new bill to that effect was completed in 1909.

c. Passage of the 1910 Act.

On January 17, 1910, Senator Gamble submitted a report on this new bill on behalf of the Senate Committee on Indian Affairs:

> The present area of the Rosebud Indian Reservation aggregated about 1,800,000 acres. The lands proposed to be opened to settlement under the provisions of this bill embrace an area of 830,000 acres. . . . Although Congress has full power to enact legislation of this character without the consent of the Indians, it was felt they should be fully advised as to the provisions of the pending measure and their views should be asked in regard thereto. The bill in question was submitted to the Indians of the reservation by a competent and experienced Indian inspector and the wishes of the Indians were sought to be met in a fair and just spirit. A number of the amendments proposed are in line with the suggestions and requests of the Indians. . . . App. 1238, 1241.

In its discussion of the allotment provisions of the bill, the Senate Report addressed the disestablishing effect of the bill on the Rosebud Reservation:

> It also provides that the Secretary of the Interior in his discretion, may permit Indians who have an allotment *within the area proposed to be opened to relinquish such allotments and to receive in lieu thereof allotments anywhere within the reservation proposed to be diminished*. App. 1238-39.

The bill was then presented to the Senate for consideration on January 17, 1910. Only one passage in the Senate record merits special attention:

> Mr. GAMBLE. Mr. President, I have apologized many times for taking the time of the Senate, *but twenty years ago practically the entire western half of the State was an Indian Reservation. It has been opened gradually and by degrees.* The Indian reservations have stood as a menace to the development and growth of the Commonwealth. The Indians themselves agreed to the provisions of this bill after

it had been submitted to them for their consideration. The department agreed to it. App. 1095.

Although the bill passed the Senate that same day, the House did not consider it for some time. Similar legislation was pending in the House and it was necesssary to determine whether the Senate bill should be substituted in its place. By February 10, 1910, a decision to adopt the Senate bill was reached by the House Committee on Indian Affairs and Congressman Burke submitted their report:

> The Rosebud Indian Reservation when set aside as a separate reservation under the Sioux Act of 1889 contained something over 3,000,000 acres of land. In 1904 the unused and unallotted portion of the reservation in Gregory County, about 500,000 acres, was disposed of and the Indians received therefrom something more than $1,500,000. In the Fifty-ninth Congress a law was enacted authorizing the sale of the unused and unallotted lands in that portion of the reservation in Tripp County, comprising about 1,000,000 acres, under a bill substantially in the same form as the bill now under consideration, except that the price of the land was fixed in the law, whereas under this bill the price is to be fixed by appraisement. The proclamation for the disposition of Tripp County lands was not issued until last year, and therefore it was not subject to filing until that time. A very large part of the lands has been entered under the homestead laws, but it is not possible to state just how much will be received from the sale of the lands in Tripp County; it will, however, undoubtedly amount to $4,000,000.
>
> The area comprised in the present bill is about 800,000 acres and the proceeds from the sale thereof, under the terms of the bill, will probably amount to $3,000,000. *There will still be left a reservation containing about 1,000,000 acres and as the Indians have all been allotted there is no occasion for continuing a reservation larger than it will be when Mellette county is disposed of.* App. 1248-49, 1272-73.

The acreage figures used in these reports are of particular importance. The reference to a reservation of approximately 3,000,000 acres refers to the original Rosebud Reservation. The reports then follow the diminishing of the original reservation

through the two completed openings and the proposed one. The acreage figures, used in the report to indicate the geographic size of the reservation, excluded all lands, both surplus and allotted, within the opened area. This belies Petitioner's argument that "diminished reservation" refers to diminished ownership of land rather than diminished boundaries. To the House Committee and the Senate Committee (*see* their report on the 1908 bill, *supra*, p. 86), "diminished reservation" meant diminished boundaries.

The bill did not reach the floor of the House for consideration until over two months later. Once again, Representative Burke gave the entire House of Representatives a complete history of the previous Rosebud legislation and placed this bill in the context of these Acts.

> Mr. BURKE. Mr. Chairman, this bill is in line — in fact, almost a duplication — of bills that have heretofore passed and become law, proposing to dispose of surplus and unallotted lands of the different Indian reservations of the country. This particular bill refers to that portion of the Rosebud Reservation in South Dakota known as Mellette County. There is contained in the tract affected by the legislation about 800,000 acres of land. The Rosebud Reservation is one of the separate reservations created out of the original Sioux Reservation by the Department and, later, the act of Congress of 1889. There are about 5,000 members of the Rosebud tribe. In the early nineties [1900's] a treaty was made with these Indians by which they agreed to cede to the United States so much of their surplus and unallotted lands as were located in Gregory County. The price to be paid for the lands was $2.50 an acre. Owing to objections here and elsewhere it was impossible to secure a ratification of that treaty.
>
> In the Fifty-seventh Congress, if I am correct about it, we enacted a law amending that treaty and changing it in this respect. Instead of paying to the Indians $2.50 an acre, the price agreed upon, we provided that the lands disposed of in the first three months after the opening should be sold at $4 an acre; the next three months, $3 an acre; and lands disposed of after six months, $2.50 an acre; then,

after four years after the opening, the undisposed of lands were to be sold without any conditions as to residence or compliance with the homestead law, and sold outright. The passage of the Rosebud bill was the beginning of the legislation that has since been enacted, relative to the sale and disposition of surplus and unallotted lands in Indian Reservations. . . . App. 1105-06.

Mr. GOLDFOGLE. . . . What is the purpose you desire to reach by this pending measure?

Mr. BURKE of South Dakota. The pending measure is a proposition to sell other lands of this same tribe of Indians in another portion of the reservation, known as Mellette County. I am going to lead up to that after I have briefly given a description of the sales of this reservation that have been made heretofore. . . . App. 1107.

Mr. BURKE. . . . I might say, Mr. Speaker, that there are two propositions to be considered in disposing of the unallotted and unused lands on Indian Reservations. One is, at the earliest possible date, to get among Indians the white men, and have those lands that are of no benefit to anyone, that are lying idle, doing no good, opened up and developed into farms, *and I believe that the placing through what were heretofore reservatons* actual settlers will have the effect of civilizing the Indians who will have allotments and also give value to these allotments which at present are of very little value. App. 1111.

The use of the phrase "heretofore reservations" in the final sentence summarizes Congressman Burke's understanding of the disestablishing effect of all three Rosebud Acts.

After these introductory remarks, the debate focused upon provisions of the bill irrelevant to the issues in this case. There was one minor amendment of the bill with which the Senate refused to concur. As a result, a conference committee was appointed to resolve the difficulties, and final passage of the bill was delayed until May 17, 1910.

Once again, in accordance with the requirement in Section 2 of the 1910 Act that the land would "be disposed of *under the general provision of the homestead and townsite laws* of the United States, and shall be opened to settlement and entry," President William H. Taft on June 29, 1911, entered the following Proclamation which made reference to this fact (R. App. 58) and declared:

> I, WILLIAM H. TAFT, President of the United States of America, by virtue of the power and authority vested in me by the Acts of Congress do hereby prescribe, proclaim and make known that all the . . . land . . . shall be disposed of *under the general provisions of the homestead laws of the United States . . . and be opened to settlement and entry* . . . R. App. 57-58.[17]

d. The Text of the 1910 Act.

The 1910 Act is substantially similar to the 1907 Act. Its operative language is identical:

> *To sell or dispose of all that portion of the Rosebud Indian Reservation* [described by metes and bounds], except such portions thereof as have been or may be hereafter allotted to Indians. App. at 1044.

Again, although the Act does not use cession terminology, the language used is equally suited to effect a disestablishment of this portion of the Rosebud Reservation.

The school lands provision was again included in the 1910 Act in Section 3. The history of this provision and the necessity for its inclusion in the 1904 Act and 1907 Act has already been set forth. Therefore, it is only necessary to state that the same reason, namely, the implementation of Section 10 of the South Dakota Enabling Act, was given for its incorporation into the 1910 Act. Once again, Respondents would argue that the inclusion of the school land provision confirms the intent of Congress to disestablish a portion of the reservation rather than the contrary. The House and Senate Committee Reports substantiate this construction:

> Sections 16 and 36 of the lands in each township are not to be disposed of, but are reserved for the use of the common schools of the State, and these lands are to be paid for by the Government *in con-*

17. *See*, the general homestead laws discussion at the 1904 Proclamation at 63, *supra*.

formity with the provisions of the act admitting the State of South Dakota into the Union. App. 1239, 1273.

There is also a provision reserving sections 16 and 36 of the lands in each township for the use of the common schools of the State of South Dakota, to be paid for by the Government at $2.50 per acre. The granting of these lands to the State is *in accordance with the provisions of the enabling act admitting South Dakota into the Union.* App. 1249, 1273.

On this same subject, Senators Gamble and Crawford had this exchange during the 1910 debates:

> Mr. GAMBLE. . . . The Government agreed to reserve these lands and pay for them, not only by law, but *under the enabling act* admitting the State of South Dakota to the Federal Union. . . .
> Mr. CRAWFORD. . . . Sections 16 and 36, to which the Senator refers, are held from the settler, and are given to the State to keep good the pledge made to the State by the Government *under the enabling act* when the State was admitted into the Union. . . . Mr. President, with reference to sections 16 and 36, they or their equivalent belong to South Dakota, because the Government of the United States granted sections 16 and 36 to the State *in the enabling act* under which the State was admitted into the Union, as it has granted to states *over and over again millions of acres of public domain* for the establishment and maintenance of common schools. App. 1071, 1073.

In light of its legislative history, Section 8 of the 1910 Act can only be construed as a continuation of the same school lands policy first established with respect to South Dakota in the 1889 Act which was premised on the disestablishment of that reservation. Its later inclusion in the Sisseton-Wahpeton Act and all three Rosebud Acts is significant evidence that all five Acts were intended by Congress to disestablish portions of a reservation and restore them to the public domain.

Another provision premised on reservation disestablishment is Section 10 of the 1910 Act:

> That the lands allotted, those retained or reserved, and the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or otherwise disposed of, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country. App. 1050.

The origin of this provision in the Mellette County Act can be traced to the Secretary of the Interior, R. A. Ballinger, who recommended the proviso in light of the United States Supreme Court Case of *United States v. Dick*, 208 U.S. 340 (1908), which held prohibitions of this nature to be constitutional even though the land was to be ceded and restored to the public domain. Specifically, Mr. Ballinger stated:

> The Supreme Court of the United States in [Dick v. United States] (208 U.S., 340), sustained a provision prohibiting the introduction of intoxicating liquors upon lands ceded by Indians, for a period of twenty-five years, but emphasized strongly the fact that the provision was for a limited period reasonable in duration. The Department doubts very much the advisability of attempting to impose upon ceded lands a perpetual prohibition against the sale of intoxicants, and also doubts the advisability of prescribing punishment for the sale of liquors in violation of the law. . . . App. 1282.

The provision upheld by this Court in *Dick* was included in a cession agreement disestablishing a portion of Nez Perce Reservation. The inclusion in the 1910 Act of Section 10, modeled after the provision reviewed in *Dick*, was the subject of active opposition in the House. A portion of the debate reads as follows:

> Mr. GOEBEL. I am opposed to attaching to the sale of any reservation conditions such as are proposed in this bill.
> Mr. GRONNA. Does the gentleman believe it would be safer on a reservation where liquors are permitted to be sold? Would the gentleman not buy land on a reservation where protection is given by the Government, even if such reservation is located in a prohibition State?
> Mr. GOEBEL. Oh, I do not know what I would do. At present I would want to get the land without any conditions attached. You must also bear in mind that when the lands are sold there is no longer a reservation, and the laws of the State apply.

Mr. BUTLER. . . . The Indian should not be tempted, if it is possible to keep the tempter away from him. Rum should not be sold to him, and no one should be permitted or encouraged to make the sale to him. I can see no reason why the Government should not impose this condition upon this land.
Mr. MURPHY. Then we ought to make this just as strong as possible, ought we not?
Mr. BUTLER. Yes, sir. Make it as strong as possible. You cannot make it too strong for me. Mr. Chairman, this land, as I understand, is within the boundaries of an Indian reservation. Is that right?
Mr. BURKE of South Dakota. Yes, sir.
Mr. BUTLER. It is proposed now to make a sale of it to somebody of some color, white or black, it does not matter. This being so, the Government has the right to impose at this time upon these titles this condition.
Mr. BARTHOLDT. But if the lands are allotted it is no longer an Indian reservation.
Mr. BUTLER. If the lands are allotted it will be no longer an Indian reservation. It is where, as I understand, the Indian has always lived and where he is going to live, and I believe in keeping the sale of liquor out of his neighborhood . . . App. 1141, 1147-48.

After reviewing *Dick* and the legislative history of section 10 the circuit court of appeals noted:

> It is highly significant that the proponents of the Section 10 acceded to the contention that the lands would no longer be an Indian reservation, and justified their position with the same argument used in *Dick, supra* — that the lands were in the neighborhood of the Indian where he would be likely to frequent. There can be no doubt here as to intent. Both sides are explicit "that when the lands are sold there is no longer a reservaton." Section 10 and its legislative history reflect a congressional understanding that the effect of the 1910 Act would be to terminate the reservation status of the Mellette County lands.
>
> What we find here is the continuation of the policy, heretofore adopted and implemented, of reducing the size of the Rosebud Reservation in order to make aportionof its lands available to the new settlers. Again, the congressional motivations are clear, as is its intent. Pet. App. 58-59.[18]

Section 1 of the 1910 Act authorized the Secretary to reserve some land for tribal purposes. The exact language reads:

> And provided further, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed and as long as agency, school, or religious institutions are maintained thereon for the benefit of said Indians . . . App. 1045.

Petitioner implies throughout its brief that the inclusion of any provisions in the three Rosebud Acts which benefited Tribal members remaining in the opened area indicates a congressional intent not to disestablish any portions of the reservation. Since Congress was aware that there would be continued presence by members of the Rosebud Sioux Tribe in the area affected, the mere inclusion in the 1910 and other Acts of some provisions for their benefit was entirely reasonable and in no way inconsistent with disestablishment. Similar provisions were also made in *DeCoteau*. *See. DeCoteau* 457.

In a related vein, Petitioner has raised quesitons regarding the Congressional policy embodied in Section 4 of the 1910 Act insofar as that section provides:

> That all lands classified as timber lands shall be reserved for the use of the Rosebud Indians . . . App. 1047.

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18. See also *Perrin v. United States*, 232 U.S. 478 (1914), discussed and cited with approval in *United States v. Mazurie*, 419 U.S. 544 (1975). In *Perrin*, a similar liquor prohibition, premised upon reservation disestablishment, was included in the 1894 certain-sum surplus land statute which disestablished the Yankton Sioux Reservation. This Court used the term "ceded lands formerly included in the Yankton Sioux Reservation" to describe the area affected by this Act. *Perrin, supra*, at 480. This statute, along with the 1889 Act and the Sisseton-Wahpeton Act of 1891, was also cited by the 1907 committee reports as precedent for the school lands provision, which was also premised on reservation disestablishment *supra* 83.
The only other case even related to the area in question involving a liquor prohibition is *United States v. Nice*, 241 U.S. 591 (1916). *Nice* turned on the status of a Rosebud allottee "in Tripp County, South Dakota" and the fact that his allotment was still held in trust. The location of the allotment relative to the boundaries of the Rosebud Reservation was irrevelant to the issue therein.

Once again the debates themselves, portions of which are set out below, refute Petitioner's argument in this case.

> Mr. STAFFORD. Will the gentleman explain why he recommends an exception in appraisement of mineral and timber lands?
> Mr. BURKE. Because they are not to be disposed of. We are reserving them. Consequently we provide that they shall not be appraised. . . .
> Mr. MONDELL. What is the gentleman's purpose in not disposing of the timber lands?
> Mr. BURKE. We are providing in this bill and in the other bill that is exactly in the same form for reserving the timber land for the use of the Indians as a forest. As a matter of fact, on this particular reservation there is not a single stick of timber, but the department seems to think the timber ought to be conserved, and so we put this language in the bill.
> Mr. MONDELL. You are conserving some timber that does not exist.
> Mr. BURKE. So far as this reservation is concerned, that is true, but we are establishing a precedent that might be good to follow in other reservations where there may be timber. . . .
> Mr. BURKE. There is, as a matter of fact, no timber land in this reservaton. We doubt if there will be found any lands that will be regarded as timber lands. But it was put in as a mere matter of precaution. App. 1188-1189, 1191.

As in the 1904 and 1907 Acts, in Section 6 of the 1910 Act Congress once again provided the means by which all tribal interest in undisposed lands would be eliminated after a stated period of years:

> *And provided further*, That all lands remaining undisposed of at the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior be reappraised in the manner provided for in this act. App. 1049.

Here, as in the 1889 uncertain-sum disestablishment Act which also contained a similar provision, Congress insured that the ultimate disposition of the lands would be consistent with reservation disestablishment.

Finally, a proviso from Section 1 of the 1910 Act makes absolutely clear the intent of Congress to diminish and thereby disestablish another portion of the Rosebud Reservation. Immediately after the operative language and metes and bounds description, the 1910 Act includes a provision which allowed Mellette County allottees the privilege of giving up their present allotments and reselecting allotments in the area of the diminished reservation. That provision states:

> That any Indians to whom allotments have been made on the *tract to be ceded* may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the *diminished reservation*. App. 1044-45.

A considerable segment of Petitioner's Brief has been devoted to an attempt to negate the plain import of the emphasized phrases above. The significance of this provision is threefold. The first feature is that it clearly distinguishes two tracts of land, the "tract to be ceded" (Mellette County) and "the diminished reservaton" (Todd County). The second is the use of the term "ceded" to describe the crux of the transaction. The third is the use of the term "diminished reservation" in a geographical sense to describe what was to remain after the opening legislation.[19]

4. The Todd County Documents.

Respondents have placed the forthcoming discussion of Todd County, which remained as the Rosebud Reservation after the passage of the 1910 Act, in this legislative history section of the brief rather than the section dealing with subsequent legislative and departmental treatment since for all practical purposes the proposed Todd County legislation is in *pari materia* with the three Acts themselves. The Todd County documents unequivocally confirm that all of the principals

19. *See*, the discussion at 39 *supra* where *identical* terminology is used to explain the *same* privilege when it was accorded the members of the Rosebud Sioux Tribe in the context of the 1901 certain-sum agreement which, it is conceded, would have disestablished a portion of the reservation. In 1910, as in 1901, diminished reservation meant diminished reservation boundaries.

involved in the decade of Rosebud legislation retrospectively viewed the three Rosebud Acts as having disestablished portions of the original reservation.

With the passage of the 1910 Rosebud Act and the concomitant opening of Mellette County to settlement, the decade of Rosebud legislation presented for construction by this case is complete. Only one of the counties within the original confines of the Rosebud Reservation remained intact., This was Todd County, an area containing approximately one million acres and located in south-central South Dakota. Even before the 1910 Act was passed, interest also was expressed about legislation affecting this portion of the Reservation.

As early as 1909, when the reservation still consisted of Todd and Mellette Counties, the Acting Commissioner of Indian Affairs received inquiries relative to the disposition of Todd County. In response, the Commissioner stated:

> No legislation has been enacted providing for the opening of Meyers [Todd] County, South Dakota, and *until* provision has been made for such opening that county will remain a part of the Rosebud Reservation. Letter from Acting Commissioner of Indian Affairs to W. W. Rankin, March 24, 1909.

In 1911, the Todd County legislation was introduced and Inspector McLaughlin was again detailed to conduct the negotiations. In the negotiations there was no question that the members of the tribe were decidedly opposed to the proposition. The refusal of the Tribe to agree to the proposition was noted in a report by Inspector McLaughlin with the recommendation that "the public interest would not be seriously affected" if the legislation was "deferred for a year or two." R. App. 66.

In a letter to the Secretary of Interior with reference to the bill proposing to open Todd County, Senator Gamble noted:

> The area proposed to be opened comprises *all the remaining lands within the Rosebud Reservation.* Conditions are such on this reservation I believe it would be greatly to the advantage of the Indians should the lands be open to settlement. Railway extensions are in prospect in this part of the state. The opening of the lands would encourage and I believe make certain such extension. The development of this part of the state has been greatly retarded in consequence of so much of the lands being held *within* Indian reservations, and I regard it a matter of the utmost importance to the development and growth of the state that the lands be thrown open to settlement at the earliest practicable date consistent with the best interest of the Indians. I know of no substantial reasons why such conditions do not now exist. Letter from Senator Gamble to the Secretary of the Interior, April 12, 1911.

There was no confusion in the minds of those familiar with the 1904, 1907 and 1910 Acts as to the effect those Acts had on the size of the Rosebud Reservation. Todd County was all that remained of the original Rosebud Reservation.

The transcripts of the council meeting held November 11, 1911, between the Tribe and Inspector McLaughlin also indicate what the Tribe understood to be the reservation following the passage of the three Acts previously discussed:

> RUBIN QUICK BEAR: . . . Everytime you come here we give you the land, . . . Now we have a small reservation and we don't want to sell or dispose of it in any form. App. 1291, 1292.
>
> TODD SMITH: Whatever I say here about the proposition is all right and Senator Gamble will know it. Tell him that he wants to buy Todd County but Todd (Smith) won't sell it. App. 1294.
>
> LEWIS BORDEAUX: . . . Before when you come for land I was always glad to help you because you are a friend of mine. *We have given you three good counties of land. And this last county we have, there is very little good land left in it, but a large lot of Sand hills.* Therefore we want to preserve this land for ourselves and we pray you for this. The people are still increasing and we want to save this land for them. *We have given you three counties.* App. 1295.
>
> CLARENCE WHITE THUNDER: . . . The next time the Great Father sends his message to Congress tell him not to mention Todd County. *We will hold on to Todd County for 50 years.* App. 1297.

Inspector McLaughlin's response confirms the Tribes understanding of the 1904, 1907 and 1910 legislation before this Court:

> INSPECTOR McLAUGHLIN: . . . I fully appreciate your feelings on this matter, knowing that *your reservation*, which *was a very large one a few years ago, is now reduced to the limits of Todd County*, and I can understand very well how you feel; that you are very desirous and anxious to retain this County intact. . . App. 1298-99.

In his report submitted on November 3, 1911, to the Secretary of the Interior, Inspector McLaughlin reiterated that:

> . . . The Indians appealed very feelingly for the retention of the remaining small acreage of their surplus land for allotment to children born to them, and it is believed that all of the agricultural lands of the *diminished* Rosebud reservation would thus be exhausted in the next two years.
>
> *The diminished reservation of the Rosebud Indians is now embraced in Todd County, South Dakota*, . . . 161,920.10 acres of surplus and unallotted lands within the *diminished* Rosebud reservation, . . . In the past eight years the Rosebud Indians have consented to *the opening of fully three-fourths of their original reservation*, that is Gregory County in 1904, Tripp County in 1909, and Mellette County, recently appraised and registered for, and open to entry April 1st next. With the *diminished reservation of the Rosebud Indians being now only about one-fourth of its area eight years ago*, . . . The Pine Ridge Indians having at present three-fourths of their original reservation intact, while the Rosebud Indians, whose reservation adjoins the Pine Ridge Indian reservation on the east, have had *their reservation diminished in the past eight years to one-fourth of its original area* . . . they having so commendably consented to each of the three cessions of their reservation in the past eight years, . . . R. App. 64-65.

McLaughlin concluded by saying that because of the opposition by the Tribe, the opening should be deferred for a year or two, but nevertheless noted that "certain erroneous wording in the Senate bill was superfluous" and should be deleted:

> . . . Furthermore, the provision in the first Section of said bill, lines 10 to 14, page 2, is superfluous, which reads: 'That any Indians to whom allotments have been made on the tract to be ceded may, incase they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation.'
>
> The said Senate Bill provides for the opening of all the surplus lands of the Rosebud Reservation and should the bill become a law there would be no *diminished Rosebud reservation*. (emphasis as in *original*). R. App. 66-67.

On January 23, 1913, Senator Gamble submitted Senate Report Number 1166 containing the following remarks, again indicating that Todd County was the Rosebud Reservation:

> In the opinion of your committee the surplus and unallotted lands are unnecessary for the use of the Indians and the opening of *the* reservation will result in a large increase in the settlement and development of that part of the State and will, to a very large extent, enhance the value of the holdings of the Indians. Your committee regards it as of the highest importance, not only to the Indians themselves but to the people of the State and to the General Government, that all the surplus and unallotted lands should be opened to settlement at the earliest practicable date. App. 1308-09.

Then on February 27, after the superfluous language had been deleted as Inspector McLaughlin suggested, the bill passed the Senate. App. 1303-06.

Immediately thereafter, President Woodrow Wilson, the Commissioner of Indian Affairs, and the Secretary of the Interior received several petitions from members of the Rosebud Sioux Tribe requesting them to take action and prevent the legislation from passing the House. The petition of March 26, 1913, from the Rosebud Agency was typical:

> Hon. Commissioner of Indian Affairs
> Washington, D.C.
>
> Dear Sir:
>
> —We, the undersigned Indians of Todd County, S. D. respectfully protest against the proposed opening of this County to settlement. We protest against opening of *our last remaining portion of our*

> *once large Reservation* for the following reasons:
> 1. *We have already been deprived of the Counties of Gregory, Tripp and Mellette within the last few years . . .*
> 4. We think that the great body of Indians interested should be consulted with and their wishes ascertained in regard to *parting with our last remnant of a Reservation. App. 1333.*

Another petition to the Commissioner of Indian Affairs stated " . . . *We have already, since the treaty of 1889, contributed to the Government, to be opened to settlers, and sold, four tracts of land . . .*" App. 1354. The petition addressed to the Secretary of the Interior contained similar remarks " . . . The very best farming land that *was* in the Rosebud Reservation we gave up when the Counties of Tripp and Gregory were opened to settlement." App. 1331.

The Secretary of Interior in turn reported that:

> *. . . by successive openings within the past few years their reservation has been reduced to less than one-fourth of its original area . . . This leaves within the diminished reservation at this time the lands in Todd County only. . .*
> The Indians are decidedly opposed to *opening the diminished reservation* at this time and that there will be but little desirable land to place on the market, should the bill become a law, I have the honor to recommend that no further action be had on the bill at this session of Congress. . . . App. 1318.

In spite of its passage in the Senate, the bill to open Todd County was tabled in the House and never became law. This fact indicates the significance of active Tribal opposition. Moreover, the above materials not only confirm Respondent's understanding of what the Congress, members of the Rosebud Sioux Tribe, the Department of the Interior and the Office of Indian Affairs meant by the term "diminished Rosebud Reservation" in the early 1900's, but they also serve to illustrate the precise "effect" the three Acts, presented above, had on the original boundaries of the Rosebud Reservation.

ARGUMENT
II
THE SUBSEQUENT TREATMENT OF THE AREAS AFFECTED BY THE ROSEBUD LEGISLATION CONFIRMS THAT CONGRESS INTENDED TO DISESTABLISH THOSE PORTIONS OF THE ROSEBUD RESERVATION.

A. Subsequent Legislative, Judicial and Administrative Treatment

The subsequent legislative, judicial and administrative treatment of the areas opened to non-Indian settlement by the 1904, 1907 and 1910 Acts confirms the conclusion that the legislation did disestablish portions of the Rosebud Reservation in Gregory, Tripp, Mellette and Lyman Counties, South Dakota. Petitioner states that "viewed as a whole, subsequent legislation, not in *pari materia*, whether pro or con, is not a reliable indicator of the congressional intent expressed in earlier Rosebud statutes, since in the subsequent statutes Congress was not focusing on the issue." Petitioner's Brief at 22. Respondents recognize the subsequent legislation is generally not accorded "much weight in construing earlier statutes" but nevertheless it is not always "without significance." *Mattz v. Arnett*, at 505, n. 25. However, this is especially true when the documentation presented, like the Todd County legislation and the 1905 extension statute, is for all practical purposes *in pari materia* with the Rosebud Acts. *See*, 99-104 *supra*. Moreover, the bulk of the material presented in this section by Respondents is roughly contemporaneous with the passage of the Rosebud Acts.

Taking an approach opposite of that of Petitioner, *amici* Association on American Indian Affairs, Inc., et al., devotes half of its entire brief to arguing that "subsequent administrative and legislative treatment of the areas of the Rosebud Reservation opened to settlement by the 1904, 1907 and 1910 Acts confirms the conclusion that the legislation did not effect the disestablishment of reservation lands in Gregory, Tripp and Mellette Counties, South Dakota."

Amicus Association on American Indian Affairs, Inc., et al. Brief at 13. Other *amici* raise similar points. Respondents feel compelled to examine the subsequent legislative, judicial and administrative treatment of these areas and view such treatment as a whole and in perspective. Significantly, much of this subsequent legislation was drafted by the sponsors of the Acts in question and is persuasive evidence of the earlier congressional intent. This complete examination reveals yet another source from which it can be discerned that Congress intended the three Rosebud Acts to disestablish Gregory, Tripp, Mellette and Lyman Counties from the Rosebud Reservation.

The two most helpful indicia of earlier congressional intent which are found in subsequent legislation are the 1905 extension statute and the Todd County documents, which have been included in the discussion of the three Rosebud Acts. *See*, 69, 99, *supra*. Since Petitioner places great emphasis on the 1904 Act and argues that the congressional intent found in that Act would control for the other two acts, the 1905 extension statute is of crucial importance as a subsequent legislative act which confirms the intent of Congress to disestablish a portion of the Rosebud Reservation.

The following acts, reports and documents are a representative cross-section of the treatment accorded the areas affected by the three Rosebud Acts by Congress, the judiciary and the Department of the Interior and contemporary South Dakota historians. Clearly, the closer in time the subsequent legislation is to the period at issue, the more relevant it is to discerning congressional intent. These materials reflect an especially consistent treatment throughout the first fifteen years following the Rosebud legislation.

An early example of the view of the Commissioner of the General Land Office appears in correspondence to Congressman Burke which was published in the *Congressional Record*.

Department of the Interior,
General Land Office,
Washington, D.C., February 7, 1906.

Hon. Charles H. Burke,
House of Representatives.

SIR: I have the honor to acknowledge the receipt of your letter of January 27, 1906, requesting to be furnished with a statement up to and including December 31, 1905, of the lands disposed of in Gregory County, S. Dak., in what was *formerly* the Rosebud Reservation, opened to entry under the provisions of the act of April 23, 1904 (33 Stat., 254)
. . .

Very respectfully,
W. A. Richards,
Commissioner.

R. App. 34.

In this period, the Acting Secretary of the Department of the Interior also used this language in writing to the Commissioner of the General Land Office regarding the opening of Tripp County:

Department of the Interior
Washington, D.C., Aug. 25, 1908.
The Commissioner of the General Land Office.

Sir: Pursuant to the proclamation of the President issued August 24, 1908, for the opening to settlement, occupation and entry of certain lands *formerly* within the Rosebud Indian Reservation in the State of South Dakota, under the act of Congress approved March 2, 1907 (34 Stat., 1230)
. . .

Very Respectfully,
Jesse E. Wilson,
Acting Secretary

In its annual review of the progress of South Dakota for 1908, the South Dakota State Department of History discussed the opening thus:

Perhaps the most noteworthy event of the year 1908 in South Dakota has been the opening to settlement of the unallotted lands in *Tripp County, formerly a portion of the Rosebud Indian Reserva-*

tion. Pursuant to an act of Congress providing for the opening of these lands, the President in September issued his proclamation, directing that from October 7 to October 17 parties desiring to locate homesteads upon the Tripp County lands be permitted to register for the chance of drawing a homestead at Dallas, Bonesteel, Chamberlain or Presho, and during the period designated 114,769 registrations were made, though there were but four thousand homesteads available. The registrations exceeded the former rush to Gregory county lands in 1904 by more than eight thousand . . . V. South Dakota Historical Collections, 45 (1910).

The Report of Rosebud Indian Agent C. L. Ellis to the Commissioner of Indian Affairs contained several references to the diminished reservation.

> The Rosebud agency is located on the southern boundary of South Dakota.
>
> *Originally* the reservation extended to the Missouri River on the east, a distance of 150 miles east and west, and 50 miles north and south, and contained about three and one-quarter million acres of land. By the act of April 23, 1904, that part now known as Gregory County, on the eastern end of the reservaton, was ceded and the surplus or unallotted lands made available for homesteads. Under the act of March 2, 1907 (Public No. 195), a tract about 33 miles east and west and 50 miles north and *east of the present diminished* reservation was opened to settlement . . .
>
> What is now known as the *diminished* reservation is a tract about 50 miles square embracing the western part of the original reservation . . .
>
> If the whole of the *diminished* reservation was attached to Tripp County for judicial purposes it would be much more convenient and expeditious . . .
>
> The diminished reservation, containing about 2500 square miles, is wholly a cattle range at present . . .
>
> The burning of the grass on a great part of Tripp County early last winter found many of the cattlemen's stock to seek grass on the *diminished* reserve . . .
>
> In order to keep the cattle of the *diminished* reservation from becoming reinfected by mingling with outside stock I have asked authority for material and labor to complete the south fence line, and to construct a fence along the Tripp County line to the 10th Parallel. Many thousands of posts and much labor have been expended in repairing the fences on the other *three* sides of the reservation this season and they are now in good condition.
>
> All the other day schools are located in the *diminished* reservation . . .
>
> C. L. Ellis
> Special Indian Agent
> in charge
>
> Report to the Commissioner of Indian Affairs, Annual Report of the Rosebud Agency, C. L. Ellis, Agent, 21-27 (1909).

The 1909 Annual Report of the Commissioner of Indian Affairs included this reference to the Rosebud Reservation following the Tripp County opening:

> Rosebud, S. Dak. — This reservation has been *diminished* very rapidly within the last few years by various acts of Congress . . .
>
> Respectfully,
> Robert G. Valentine,
> Commissioner
>
> Report of the Commissioner of Indian Affairs, 42 (1909).

In 1910, Commissioner Valentine added:

> Department of the Interior
> Office of Indian Affairs
> Washington, November 1, 1910
>
> Sir:
>
> I have the honor to transmit herewith the Seventy-ninth Annual Report of the Office of Indian Affairs covering the period July 1, 1909, to June 30, 1910 . . .
>
> Rosebud S. D. . . . *This reservation has been diminished previously by various acts of Congress,* and the act of May 30, 1910 (36 Stat., 448), authorizes the *disposal* of a part of this resrvation lying within Mellette and Washabaugh counties . . .
>
> Respectfully,
> Robert G. Valentine,
> Commissioner
>
> Report of Commissioner of Indian Affairs, 32 (1910).

In 1911, the Interior Department handed down this land decision:

NEWTON DEXTER BURCH.
Decided April 26, 1911.
ROSEBUD INDIAN LANDS —
SOLDIERS' ADDITIONAL RIGHT.

Lands in the *former* Rosebud Indian Reservation opened by proclamation of August 24, 1908, under the act of March 2, 1907, to disposal under the general provisions of the homestead and townsite laws, are not subject to appropriation by location of soldiers' additional right.

PIERCE, First Assistant Secretary:

Newton Dexter Burch has filed appeal from decisions of January 18, 1911, by the Commissioner of the General Land Office, holding for cancellation the final certificate and rejecting his several applications filed on or about October 8, 1909, under sections 2306 and 2307, R.S., for the different subdivisions of the SW 1/4 of Sec. 27, T. 101 N., R. 76 W., 5th P.M., containing 160 acres, Gregory, South Dakota, land district. The said tracts are a part of the *former* Rosebud Indian Reservation, opened by proclamation of the President, dated August 24, 1908 (37 L.D., 122), under the act of March 2, 1907 (34 Stat., 1230) . . . 40 L.D. 54 (1911).

It also sent these Instructions to the Register and Receiver in Gregory County:

INSTRUCTIONS.
DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE
Washington, D.C., September 8, 1911.

Register and RECEIVER,
Gregory, South Dakota.

GENTLEMEN:

Your attention is directed to the provision of the act of Congress, approved August 17, 1911, (Public — No. 22), entitled "An act extending the time of payment to certain homesteaders *in* the Rosebud Indian Reservation, in the State of South Dakota," which reads as follows:

> Be it enacted by the Senate and House of Representative of the United States of America in Congress assembled, That any person who has heretofore made a homestead entry for land in what was *formerly* a part of the Rosebud Indian Reservation, in the State of South Dakota, . . .
>
> Very Respectfully,
> John McPaul
> Approved Samuel Adams,
> Acting Secretary
> 40 L.D. 267 (1911).

In 1914, discussing a bill involving Tripp County, Congressman Burke described Tripp County as follows:

> Mr. BURKE of South Dakota. I will state that this bill originally was introduced, or a similar bill, was limited to *Tripp County, what was formerly part of the Rosebud Reservation* . . .
> . . .so that it will be limited to lands in Tripp County, in what *was formerly within* the Rosebud Indian Reservation . . .
> . . .so that the bill will be limited to lands in Tripp County *formerly within* the Rosebud Indian Reservation. 52 Cong. Rec. 453 (1914).

The Act of January 11, 1915, 33 Stat. 792, refers to the former reservation:

> AN ACT Providing for the purchase and disposal of certain lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, *in Tripp County, formerly a part of the Rosebud Indian Reservation in South Dakota.*
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County in what was *formerly within the Rosebud Indian Reservation* in South Dakota, as have heretofore been opened to settlement and entry under acts of Congress which did not authorize the disposal of such mineral lands.

The Commissioner of the General Land Office wrote to the Register and Receiver in Gregory County on July 15, 1915 regarding this Act:

TRIPP COUNTY MINERAL LANDS
ACT JANUARY 11, 1915.
INSTRUCTIONS.
(No. 425).

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE
Washington, July 15, 1915.

REGISTER AND RECEIVER.
United States Land Office
Gregory, South Dakota.

SIRS:

1. The act approved January 11, 1915 (38 Stat., 792), provides that all lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County, in *what was formerly within the Rosebud Indian Reservation in South Dakota*, as have heretofore been opened to settlement and entry under acts of Congress which did not authorize the disposal of such mineral lands, . . .

Very respectfully,
Clay Tallman,
Commissioner.

Approved, July 15, 1915.
A.A. Jones
First Assistant Secretary
44 L.D. 195 (1915).

The Department added this Editorial Note in its 1915 Land Decisions:

EDITORIAL NOTE

In connection with the foregoing regulations as printed in pamphlet form there were added, as an appendix, for information and convenient reference, reprints of the instructions of . . . 44 L.D., 195, under the act of January 11, 1915, providing for the purchase and disposal of certain lands containing kaolin, kaolinite, fuller's earth, China clay, and ball clay, in Tripp County, *formerly* a part of the Rosebud Indian reservation, South Dakota.

Department of the Interior, Ann. Rep. of the Comm. of the General Land Office, 165 (1916):

Rosebud Indian Lands.

Unentered land *within the former Rosebud Indian Reservation in Lyman and Tripp Counties*, South Dakota, were offered for sale to the highest bidders for cash at Gregory, South Dakota, on September 23, 1915. The prices received ranged from $2.50 to $7 per acre. In all 5,763.71 acres were sold for $17,866.07. *All* tracts were sold. The sale was made under authority of the act of March 2, 1907 (34 Stat. 1230), and departmental regulations approved July 28, 1915 . . .

Very respectfully,
Clay Laceman,
Commissioner
44 L.D. 325 (1915).

The Act of March 3, 1919, 40 Stat. 1320, also referred to the former reservation:

Be it enacted, etc., That the Secretary of the Interior is hereby authorized to sell and convey to the White River Cemetery Co., for cemetery purposes, for a price not less than the appraised value thereof, a 10-acre tract within the *former Rosebud Indian Reservation in Mellette County*, S. D. described as the northeast quarter of the southeast quarter of the northwest quarter of section 34, township 42 north, range 29 west, sixth principal meridian, or such part thereof as may be required: *Provided, however*, That the tract conveyed shall be described in terms of the legal survey, the consideration to be paid to the superintendent of the Rosebud Reservaton, to be deposited in the Treasury of the United States to the credit of the Rosebud Indians. App. 1373.

Included in the committee report on this bill is a letter to Hon. Charles D. Carter, Chairman, Committee on Indian Affairs, House of Representatives, from Alexander T. Vogelsang, Acting Secretary of the Interior, June 7, 1918:

My Dear Mr. Carter:

I am in receipt of your letter of May 14, 1918, enclosing for report H.R. 12082, a bill authorizing the sale of certain lands in South Dakota for cemetery purposes, and in response thereto I have the honor to submit the following:

The bill proposes to convey for cemetery purposes a 10-acre tract within the *former Rosebud Indian Reservation in Mellette County*, S. Dak., described

> as . . . Said land was opened to settlement and entry under the act of May 30, 1910 (36 Stat., 448) which provides that the proceeds of the sale of the lands in said *former Indian reservation* shall be deposited to the credit of the Indians thereof and that the disposal of the land by the United States shall be in trust for their benefit . . . App. 1378-79.

Regarding an act passed one day earlier on March 2, 1919, the Department of Interior sent these Instructions to the General Land Office:

> REGULATIONS FOR THE SALE OF CERTAIN LOTS IN MINNEOTA TOWNSITE IN THE *FORMER* ROSEBUD INDIAN RESERVATION, TRIPP COUNTY, SOUTH DAKOTA.
>
> INSTRUCTIONS.
>
> DEPARTMENT OF THE INTERIOR, Washington, D.C., May 24, 1919.
>
> THE COMMISSIONER OF THE GENERAL LAND OFFICE:
>
> Under the provisions of the act of March 2, 1907 (34 Stat., 1230), you are directed to cause the lots designated from "A" to "S" inclusive in the townsite of Minneota within the *former* Rosebud Indian Reservation, Tripp County, South Dakota, to be offered for sale at public outcry under the supervision of the Superintendent of Opening and Sale of Indian Lands at not less than their appraised value on June 14, 1919, . . .
>
> Alexander T. Vogelsang, First Assistant Secretary
>
> 47 L.D. 177 (1919).

In the Annual Report of the Board of Indian Commissioners to the Secretary of the Interior, Report on the Rosebud Indian Agency, South Dakota, 28 (1921), Hugh L. Scott stated:

> . . . there are several large towns *on what used to be* the old reservation. The largest is Winner, [Tripp County] . . .

Similar legislative and judicial documentation could be set forth for the 1920's through the 1950's, but for all practical purposes, the probative value of such material as a source of

ascertaining congressional intent in the three Rosebud Acts would be less significant. To illustrate the fact that this treatment was continuous through subsequent decades, Respondents note the official Interior correspondence to South Dakota Congressman E. Y. Berry from Assistant Secretary of Interior Roger Ernst dated *May 28, 1959* still described the area in question and the diminished Reservation in the same unambiguous terms as were used in the decade immediately following the enactment of the Rosebud legislation.

> . . .The *boundaries* of the Rosebud Indian Reservation *were changed* to eliminate Mellette County, and to show the *diminished reservation as lying in Todd County*. This is shown on the map of South Dakota published by this Department in *1918*. There remained, however, within Mellette County Indian allotments which were effective and did not come within the cession and opening under the 1910 act. The ceded lands fall within not only Mellette County, but *the adjoining counties* within the *former* boundary of the original Rosebud Indian Reservation. Letter from Roger Ernst, Asst. Secretary of the Interior to E. Y Berry, May 28, 1959.

In *DeCoteau*, a search of the entire legislative history of the Lake Traverse Reservation subsequent to the 1891 Act did not produce a single statute that described the reservation as a "former reservation" or as "heretofore a reservaton." In fact, the only references of this nature available in *DeCoteau* were a series of informal Interior correspondence which also contained references of a contrary nature. As a result, the Court did not deem either the references or the sources persuasive:

> The parties here have cited us to numerous Interior Department *memoranda and letters*, issued over the past 80 odd years, which refer to the area either as a "reservation" or a "former reservation." No consistent pattern emerges. The authors of *these* documents appear to have put no particular significance on their choice of a label. *DeCoteau, supra* at 1092, N. 27.

In this case a consistent pattern did emerge, and not just in letters authored by individuals who were somewhat removed from the Acts in question. The legislation and other documents in support of this construction were generally drafted by the sponsors of the Rosebud Acts and others familiar with those Acts. In this respect, the Rosebud documents are inherently more persuasive than those presented to the Court in *DeCoteau*. Treatment of the area affected by the three Rosebud Acts confirms the construction that these three statutes disestablished portions of the Rosebud Reservation.

B. The Cartographic Record.

One area which was accorded special significance by this Court in *DeCoteau* was the cartographic record, which graphically illustrated the fact that the Department of the Interior considered the Sisseton-Wahpeton Reservation to have been disestablished by the Act of 1891. The cartographic history of the areas affected by the Rosebud Acts is identical to that of the Sisseton-Wahpeton Reservaton. The official maps reflect the immediate and unequivocal interpretation of the three Acts by the various administrative agencies involved, and buttress the express administrative pronouncements, *supra*, that the Rosebud Reservation had in fact been diminished to encompass only Todd County.

For a considerable period of time prior to the Acts in question, the official Map of the Office of Indian Affairs showing Indian Reservations within the United States was compiled under the direction of the Commissioner of Indian Affairs and appended each year to his Annual Report. Reservations as such were represented by solid configurations superimposed upon an outline of the United States. When an act or cession disestablished a reservation or a portion thereof and the reservation was subsequently opened to settlement that portion of the configuration thereby affected was consistently removed. Ordinarily this removal corresponded with the year of the proclaimed opening rather than the year in which the

Act was passed. For example, *see* the treatment accorded the Great Sioux Reservation in 1888 and 1889, as well as the reservations in Oklahoma between 1891-1900.

In the 1890's, prior to the Acts in question, the Rosebud Reservation was represented yearly as a large configuration occupying the eastern one half of the southwestern portion of the State of South Dakota. In 1904 that portion of the Rosebud Reservation affected by the 1904 Act, and opened in 1904, i.e., Gregory County, was immediately, and unequivocally removed from this official map in the same manner that other reservations or portions thereof that had been similarly disestablished were removed throughout the 1880's and 1890's. The same official Maps of 1904, 1905, 1906, 1907 and 1908 thus depict the Rosebud Reservation in the precise square configuration that Inspector McLaughlin, Congressman Burke, Senator Gamble and the House and Senate Reports described.

The Counties of Tripp and Mellette affected by the 1907 and 1910 Acts would have been similarly removed in the years when opened, i.e., 1909 and 1911, but for a change in administration in 1909 which resulted in a change in the manner of depicting the reservations thus disestablished. When Commissioner Valentine replaced Commissioner Luepp as the Commissioner of Indian Affairs, colored lines appeared encompassing what had theretofore been reservations, but had subsequently been disestablished. These areas were referred to in legend as "open" reservations. This change occurred in 1909, when Tripp County was opened. As a result, the 1909 Map of Indian Reservations appeared with colored lines encompassing what had been the Gregory and Tripp County portion of the original Rosebud Reservation, as well as many other disestablished reservations such as those in Oklahoma, and these areas were referred to in the legend as "open" Reservations. After the opening of Mellette County in 1912, only Todd County was denoted in the legend as an "Indian Reservation" and it was represented by the same solid configuration as in years past. Other reservations that

had never been disestablished and opened to settlement also continued to be represented in the same manner as Todd County.

By 1918, the "open" areas encompassed by colored lines were shaded gray, and designated in the legend as "Former" Reservations. All four counties affected by the three Acts in question are depicted in this manner, as well as the areas of other reservations that were similarly disestablished. As one might expect, only Todd County continued to be denoted in the legend by the solid configuration representing "Indian Reservations."

If the three Rosebud Acts were intended by Congress to disestablish portions of the original Rosebud Reservation in the same manner as this Court found that Congress had disestablished the Sisseton-Wahpeton Reservation by the 1891 certain-sum Act, the corresponding cartographic records of both areas should be identical. This is in fact the case. The Sisseton-Wahpeton Reservation, initially removed from the maps when proclaimed open in 1892, reappeared encompassed by the colored line that denoted "open" reservations in 1909, and was shaded to denote a "former" reservation in 1918. This Court viewed as significant this early cartographic record of the Sisseton-Wahpeton Reservation when contrasted with the recent 1971 Bureau of Indian Affairs map which designated the Sisseton-Wahpeton area as an Indian reservation. *DeCoteau, supra* at 442, n. 27. Respondents deem it highly significant that cartographic record of the original Rosebud Reservation is identical with that of the original Sisseton-Wahpeton Reservation from initial disestablishment through its resurrection on the recent 1971 Bureau of Indian Affairs map.

The cartographic record of the Rosebud Reservation is even more persuasive than that of the Sisseton-Wahpeton Reservation because the Rosebud Acts affected only portions of the Rosebud Reservaton. This fact is graphically documented on other official maps.

These are the official Maps published under the direction of

the General Land Office, the agency primarily responsible for the entire cartographic record of the United States. Again, the treatment accorded the Rosebud Reservation reflects the statements and decisions of the agency noted *supra* that the Acts in question diminished the Rosebud Reservation so that it encompassed only Todd County. Although these maps were not revised annually, as were the official Maps of the Office of Indian Affairs, each revision reflected the Acts passed in the interim years by the removal of that portion of the reservation from the map. In certain instances the title of the particular reservation was restricted to indicate that a certain area was no longer within a certain reservation. With specific reference to the Rosebud Reservation, in 1901 the title "Rosebud Indian Reservation" extended over the length of the four county area.[20] Upon revision in 1910, the same title was reprinted so as to cover only Todd and Mellette Counties. By 1916 the process was complete so that only Todd County was represented as the Rosebud Reservation. The 1918 Map of the Secretary of Interior, *supra* at 115, also reflects that the boundaries of the Rosebud Reservation encompassed only Todd County.

Other miscellaneous maps are on file in the Cartographic Archives Division of the National Archives, Washington, D.C., which similarly reflect the fact that the Rosebud Reservation had been diminished. While varying in detail, some of the published Maps separate the "ceded" area from the "diminished reservation" by "diminished reservation boundaries." Respondents have obtained certified copies of these and other maps referred to *supra* and will lodge them with the Clerk.

Respondents would not want to imply that each and every map on file in the Cartographic Archives Division, National Archives, Washington, D.C., unequivocally supports this

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20. Special mention should be made of the fact that some of the same official 1901 maps were later penciled over to indicate certain areas had been "opened" in certain years. These maps, published in 1901 would, of course, be so entitled that *Rosebud Indian Reservation* would extend over the original area of the Rosebud Reservation. In this respect, they are initially somewhat misleading.

construction. Some maps, such as the map reproduced at P. App. 17a, which are free hand and unpublished and originally designated for an unrelated purpose, as well as a few others, do not depict the Rosebud Reservation in the manner related above.

C. The Indian Reorganization Act.

Petitioner and *amici* attempt to draw some support for their arguments from certain provisions of the Indian Reorganization Act of 1934, 48 Stat. 984. This Act is 24 years removed from the language, legislative history and surrounding circumstances of the last Rosebud Act in question, and was passed at a time when it is acknowledged that the philosophy of Congress was no longer in accord with the philosophy of Section 5 of the General Allotment Act of 1887 and the special surplus land statutes enacted pursuant thereto. However, the 1934 Act will be discussed in this brief to put to rest the erroneous contentions which Petitioner and *amici* have derived from the Act, and, more importantly, because this Act, when viewed in light of its actual purpose and effect, lends support to the position of the Respondents.

Respondents have examined the legislative history of the Indian Reorganization Act and find it to be unsupportive of the sweeping conclusions which Petitioner and *amici* have attempted to draw from it. Insofar as the instant case is concerned, the Act was simply intended to do what it expressly accomplished — the restoration of lands to tribal ownership. The Act was not intended to have, nor did it incidentally have, any effect upon reservation boundaries. Section 2 of the Act directed the Interior Department to temporarily withdraw certain "remaining surplus lands of any Indian reservation *heretofore* opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States" from further disposition by public entry, sale or otherwise. Act of June 18, 1934, *supra*. In all, it is obviously begging the question to argue that any reservation included in a list of "reservations heretofore opened" must necessarily exist as

originally defined. The proper construction of the term "opened" in the *Rosebud* context is just as much at issue here as it was in *DeCoteau*.

The United States has placed great reliance upon a 1934 Interior Department Opinion relating to the temporary withdrawal pursuant to this Section of the Act. In its Memorandum, the United States originally asserted that the Department "decided in a formal opinion (54 I.D. 559) that this type of statute does not terminate the reservation status." M.U.S. at 8. In its brief before this Court, the United States has retreated from this position. Nevertheless, continued reliance is placed upon this Opinion.[21]

The purpose of the Opinion, as stated in the Opinion, was simply to respond to a general directive in the 1934 Indian Reorganization Act to temporarily withdraw certain "remaining surplus lands of any Indian reservation *heretofore* opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States" from further disposition by public entry, sale or otherwise. Act of June 18, 1934, *supra*. The temporary withdrawal was necessary to insure that restoration to tribal ownership at a later date would at least be possible. 54 I.D. at 561 (1934).

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21. The United States no longer asserts that this 1934 Opinion held that uncertain-sum acts did not disestablish reservations, since Respondents have pointed out the 1938 Opinion discussed above. Instead, the United States now asserts that every court which has ever decided the effect of such an act on reservation boundaries has held that the boundaries were not affected.

On the contrary, even when this question was first presented, the courts consistently held that the uncertain-sum acts affecting South Dakota did disestablish portions of reservations. *See United States v. LePlant*, 200 F. 92 (D.S.D. 1911); *State v. Sauter*, 48 S.D. 409, 205 N.W. 25 (1925); *State ex rel. Swift v. Erickson*; *State ex rel. Hollow Horn Bear v. Jameson*, 77 S.D. 527, 95 N.W. 2d 181 (1959); *Lafferty v. State for Jameson*, 80 S.D. 421, 125 N.W. 2d 171 (1963); *State v. Barnes*, 81 S.D. 511, 137 N.W. 2d 793 (1965); *Beardslee v. United States*, 387 F. 2d 280 (8th Cir. 1967); *Kills Plenty v. United States*, 133 F. 2d 292 (C.A. 8 1943); *State v. White Horse*, 231 N.W. 2d 847 (S.D. 1975); *Cook v. State*, 215 N.W. 2d 832 (1974); *United States v. Long Elk*, 410 F. Supp. 1174 (D.S.D. 1976). The last case is also ignored by Petitioner in the selected list of "Surplus Land Statutes" in its appendix. Pet. App. 11a. Petitioner and the United States also ignore the recent decision of the South Dakota Supreme Court in *White Horse*, *supra*, which specifically followed the Court of Appeals decision below with respect to the 1910 Rosebud Act.

In the Opinion, a decision was made to include within the withdrawal only those lands "the proceeds of which, if sold, would be deposited in the Treasury of the United States for the benefit of the Indians." 54 I.D. at 563 (1934). In other words, the withdrawal was to be limited to those remaining surplus lands of reservations heretofore opened only by surplus land statutes in which the method of payment was the uncertain-sum arrangement. The basis for this distinction is stated in the Opinion.

> It can safely be said that it would not be *to the interest of the public* to restore to the Indians all undisposed of public lands that at one time were in Indian ownership but afterwards became the property of the United States by outright cessions from the Indian owners, *[DeCoteau]* because, as stated above, such action would mean the withdrawal in many States of all lands now available for entry as public domain. Such action undoubtedly would raise strong opposition in the various localities affected and have an undesirable bearing on the new Indian legislation. 54 I.D. 559, 560 (1934).

Thus, the uncertain-sum arrangement in issue here clearly did not play a crucial part in this decision. Except for the "interest of the public," the Opinion could have included the remaining surplus lands of any reservation heretofore opened including the original Lake Traverse Reservation in issue in *DeCoteau*. A departmental policy decision, not a legal one, guided the Department in rendering this Opinion.

Four years after the Department issued the temporary withdrawal opinion, the Secretary of Interior, at the instance of the Commissioner of Indian Affairs, requested a more formal opinion on the status of the remaining surplus lands of the "heretofore opened" Ute Reservation ceded in 1880 which was also included in the initial list. In this Opinion, the Acting Solicitor removes the basis of the current position of the United States:

> In my judgment, *even if the reservation of the Confederated Bands of Utes was held no longer to exist*, that fact alone would not negative the

> application of section 3 of the Indian Reorganization Act to the remaining undisposed of lands of that reservation. The phrase "of any Indian reservation" must be used in section 3 to describe the character and location of the lands *at the time they were opened* to disposal under the public land laws. The lands which may be restored to tribal ownership must be lands which were part of any Indian reservation, not of any forest or military reservation or of any other class of lands. Section 3 cannot mean that the lands must *now* have the character of Indian reservation lands, *as they are not reservation lands* but lands capable of being restored to reservation status under the Indian Reorganization Act. *Nor can section 3 mean that the lands must be located within the geographical limits of an Indian reservation.* R. App. 118.

Therefore, in 1938 even the Department made clear that neither the 1934 Indian Reorganization Act nor any of the restoration orders issued pursuant to it had anything to do with reservation boundaries *per se* or the issue that is now before this Court.

On a related point, Respondents are cognizant that a Restoration Order issued pursuant to the 1934 Indian Reorganization Act was cited by this Court in *Seymour*. This Restoration Order may have been of some significance in *Seymour* because the State of Washington had to maintain that the entire Colville Reservation did not exist. For Congress to recognize and add certain parcels of land to a reservation that Washington maintained did not exist at all, may have seemed somewhat incongruous to the Court. However, this is definitely not the situation in the instant case. The Rosebud Reservation [Todd County] has never been disestablished and as such, a congressional recognition of a Rosebud Reservation in 1934 would be probative of nothing. Moreover, in the 1938 Restoration Order included by *Amicus* United States in the Appendix to its brief at 33A, certain land in Mellette County was "added to and made a part of the existing reservation, subject to any valid existing rights." If as *amicus* United States and Petitioner claim, all

of Mellette County was still within the boundaries of the Rosebud Reservation in 1938, then the land would have already been "part of the existing reservation." Moreover, other Restoration Orders alternately refer to the same areas as "within" the "boundaries" of the "former" Reservation (Restoration Order of Oscar L. Chapman, Assistant Secretary of the Interior, June 12, 1941) in this respect, confirming the substance of the 1938 opinion.

Another aspect of the 1938 opinion removes a crucial underpinning of Petitioner's entire position. The Acting Solicitor was not unaware of the fact that the use of the uncertain-sum method of payment resulted in a lingering beneficial interest. Unlike *Petitioner* and *amici*, however, he found no connection between this lingering interest and reservation boundaries. In fact, he goes on to discuss several examples wherein this lingering interest remained in land unquestionably outside the boundaries of a reservation following the opening and disestablishment of that part of the reservation or portion thereof by Congress. The first example listed was this Court's decision of *Ash Sheep Company v. United States*, 252 U.S. 159 (1920) and the act discussed therein.

In *Ash Sheep* the Court was presented with the question of whether the Crow Tribe retained a lingering beneficial interest in surplus lands which it had *ceded* under a 1904 act that contained the uncertain-sum provision. The Court held that this beneficial interest did exist *until* the lands were filed or settled upon. *Ash Sheep, supra* at 166. Significantly, the nature of this lingering beneficial interest did not, however, alter the fact that the 1904 act which recited and ratified the Crow cession effectively *disestablished* the surplus area so ceded from the Crow reservation.

The Court in *Ash Sheep* did not directly address this aspect of the cession question. It was made clear on the face of the Act. Because the area to be ceded could not be described by means of county subdivisions, *new boundary lines* were mentioned in the act in no less than five separate places. Act

of April 27, 1904, 33 Stat. 352, 359, 360. Section 4 is an example of the language employed therein:

> SECTION IV. That for the purpose of *segregating the ceded lands from the diminished reservation, the new boundary lines* described in Article I of this Agreement shall when necessary be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments, the costs of said survey to be paid by the United States. Act of April 27, 1904, 33 Stat. 352, 355. [22]

Thus, in its opinion, the Court simply noted:

> The agreement embodied in this act of Congress provided for a division of the Crow Indian Reservation in Montana on *boundary lines* which were described, and the lands involved in this case were within the part of the reservation as to which the Indians, in terms, 'ceded, granted and relinquished' to the United States all of their 'right, title, and interest.' *Ash Sheep Company, supra* at 164.

The 1904 Crow Act involved the uncertain-sum arrangement, and it was intended and did effectively disestablish the ceded surplus portion of the reservation.

The *Ash Sheep* decision and the Great Sioux Act make clear that the lingering beneficial interest is not incompatible with, or even related to, reservation disestablishment. The 1938 Opinion further shows that no such relationship is supplied by the question of whether lands in which there is a lingering interest are "public lands" or "Indian lands." In this respect the Opinion explains that lands are simultaneously qualified public lands and qualified Indian lands. The Opinion offers this analysis which was also accepted and followed by Felix Cohen, *supra*, p. 335:

> the result is that the Indians retain an equitable interest in the land until they have received the consideration bargained for, and the United States becomes a "trustee in possession."

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22. It is interesting to note that, again in this instance, the diminished reservation terminology could only have meant diminished reservation boundaries. In addition to the support for this position, set forth through this brief, Respondents would also point out the similar use of the term by this Court in Seymour and DeCoteau. See also the agreements cited in DeCoteau, *supra* 439 N. 22.

Surplus ceded lands to be disposed of for the Indians are frequently referred to in acts of Congress and departmental actions both as public lands and Indian lands. . . .

> In the act of Congress dismembering the Great Sioux Reservation, a provision that the unreserved lands shall be restored to the public domain is used in two places with obviously different meanings. In section 21 it is provided that the unreserved land shall be "restored to the public domain" to be disposed of to actual settlers only, the proceeds to go to the Indians. However, it is then provided that if the lands are not disposed of at the end of 10 years, they shall be paid for by the United States at a designated rate, and that the lands so purchased should then become "a part of the public domain." The first provision restoring the lands to the public domain could have had no legal effect to alter the equitable interest of the Indians in the land until sold or purchased by the United States.
>
> *Surplus lands ceded to be disposed of for the Indians are in fact qualified public lands and also qualifed Indian lands.* They are public lands in that the United States has the legal title and has secured from the Indians a release of their right of occupancy and has arranged to dispose of them, but they are not public lands in the full sense of the term as they are to be disposed of only in limited ways and upon certain conditions. It should be noted that both the 1880 and 1882 acts concerning the Ute land qualifed the reference to the land as public land and subject to disposal under the public land laws by stated conditions and restrictions.
>
> Surplus lands are also properly designated as Indian lands in view of the interest of the Indians in the proceeds of any disposal of the lands. This equitable interest is the significant condition attached to the lands which distinguishes them from the public lands generally as Indian lands. R. App. 123-24.

Thus the lingering beneficial interest is not related to, nor incompatible with, reservation disestablishment. Moreover, it does not prevent restoration of reservation areas to what is, in essence, the public domain.

In conjunction with the above 1934 Act arguments Petitioner and *amici* also cite Sec. 8 of the 1934 Act as additional evidence that the three Rosebud Acts could not have been intended by Congress to disestablish portions of the original Rosebud Reservation. Building on this point, Petitioner then sets forth "accrued taxes" and "lost allotments" as part of the "calamitous" results which would follow unless the Court reestablished the boundaries of the original Rosebud reservation. Initially Respondents would point out that Section 8 was directed only to "Indian allotments or homesteads" and concerned other sections of the 1934 Act and not the status of the surplus lands of "reservations heretofore opened."

Secondly, even in the abstract, the 1934 Opinion, *supra*, makes clear that the allotments of the Lake Traverse Reservation and others similarly located could be equally within the purview of Petitioner's argument. Since for all practical purposes all of the area affected by the three Rosebud Acts has been treated since the Acts as being outside the Rosebud Reservation, neither the argument nor the alleged results have any basis in reality.

If the uncertain-sum characteristic was the distinguishing factor, the 1934 Indian Reorganization Act Opinion and Petitioner's Table (R. App. 4a) should have included every uncertain-sum Act ever passed by Congress. At least 43 separate statutes of this type have been listed in the National Indian Law Library, Boulder, Colorado. N. I. L.L. No. 002279. Following Petitioner's argument to its logical conclusion would lead to the re-establishment of reservations within reservations within reservations — the same result that would have occurred had this Court accepted the similar generalized arguments advanced in *DeCoteau*.

Finally, although Respondents are not in a position to verify the current and accepted jurisdictional history of even the thirty statutes listed in the 1934 Opinion, striking differences exist among the acts and reservations listed. For example, included in the list in the Opinion is the Uintah and

Ouray Reservation and the Act of March 27, 1902, 32 Stat. 263. This Act, which placed the Uintah and Ouray Reservation in the "heretofore opened" reservation status *on its face* directed that "all the unallotted lands within said reservation *shall be restored to the public domain.*" Act, *supra*. *Mattz*, *supra* at 504, N. 22. The language and the jurisdictional history of other "heretofore opened" reservations in the same list such as the 1880 Ute Act in Colorado, and others in South Dakota, and Wyoming are equally uncertain. In 1934, at least certain of these remaining surplus lands were not then within the boundaries of any reservation. At the same time, the opposite might be true in other instances listed, but this is not the point. As reliable indicia of the issues presented herein, the 1934 Indian Reorganization Act and the 1934 Departmental Opinion issued pursuant thereto are not acceptable.

D. The Definition of Indian Country: 18 U.S.C. § 1151.

In order to cover fully the post-1910 materials, there must be a discussion of 18 U.S.C. § 1151 and its implications for this case. Both Petitioner and several *amici* have raised the issue of "checkerboarding" in their briefs.

Respondents have waited until this point to discuss the implications of the 18 U.S.C. § 1151 for the reason that here as in *DeCoteau*, it is not until after this Court has examined the legislative materials that a consideration of 18 U.S.C. § 1151 becomes relevant.

The definition of Indian Country is set forth at 18 U.S.C. § 1151:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139 § 25, 63 Stat. 94.

Only subsections (a) and (c) are relevant to the issues presented herein.

1. 18 U.S.C. 1151(a): Jurisdiction Within The Limits of Any Indian Reservation.

In 1948 when the definition of Indian Country was revised to its present form, it was the almost unanimous conclusion of all state and federal courts that "opened reservations" were not reservations at all. Rather, this terminology denoted areas which were once reservations but had been disestablished by special acts of Congress.

In Rosebud, with each opening of a portion of the Rosebud Reservation, the Act, its legislative history and its surrounding circumstances demonstrate that the boundaries were necessarily reduced to encompass the area remaining or the diminished reservation — in this instance Todd County. The disestablished area was no longer within the boundaries of the Rosebud Reservation, although it continued in some instances to be improperly referred to as the "opened reservation," similar to the improper "opened" references regarding the Sisseton-Wahpeton Reservation. The trust allotments situated on the "opened" portions were interspersed among the fee land of the homesteaders after the opening of the area to settlement and were outside the boundaries of the reservation.

In the beginning, the trust allotments within the boundaries of the reservation [Todd County] were interspersed among the rest of the undivided tracts of trust land held in common by the Rosebud Sioux Tribe. However, after a period of time, the United States no longer held the title to all the area within Todd County in "trust." Primarily this situation was the result of allotment pursuant to *Section 6* of the General Allotment Act and the eventual issuance of some patents in fee to individual members of the tribe. In most in-

stances, title to the land was then transferred to another person — sometimes a member of the tribe and sometimes not. This whole process soon resulted in the "checkerboarding" of fee and trust land *within* the diminished reservation. The jurisdictional ramifications soon resulted in a hotly contested issue in many of the state and federal courts. In 1948, Congress resolved the issue by defining Indian Country, in part, as

> (a) [A]ll land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation . . . 18 U.S.C. § 1151.

Of particular note to the issue before this Court is the fact that when the above section was passed by Congress, Todd County was the specific example cited.

In effect, Congress codified the decisions of those courts which had previously resolved the issue consonant with that definition. The general definition of Indian country was still based upon the latest construction of the term by this Court in *United States v. McGowan*, 302 U.S. 535 (1938), a situation in which the United States retained the title to all of the land which it validly set apart for the use of the Reno Colony in Nevada. With reference to the checkerboard issue, the Reviser's Note cited with approval and reliance the 1943 Todd County decision of *Kills Plenty v. United States*, 133 F.2d 292 (CA 8 1943), *cert. den.* 319 U.S. 759 (1943). *See* Reviser's Note, 18 U.S.C. § 1151.

In *Kills Plenty* the Eighth Circuit Court of Appeals held that all of the land within Todd County was "Indian country" regardless of the issuance of patents in fee. Todd County was the only county of the original Rosebud Reservation that had never been "opened" to settlement. Todd County was for all purposes the Rosebud Reservation, and was sometimes referred to as the diminished Rosebud Reservation in acts of Congress, opinions of state and federal courts, the Office and Bureau of Indian Affairs, and maps from 1910 until 1970. In 1948 other areas that were once reservations but were subsequently affected by special acts intended by Congress to disestablish portions of reservations were not considered to be within the boundaries of reservations or under the jurisdiction of the federal government. Indeed, no one can read the *Kills Plenty* decision and the cases cited therein and reach a contrary conclusion. This was the virtually unanimous view in 1943 of state and federal courts.

It is interesting to note that the 1922 decision of *United States v. Frank Black Spotted Horse*, 282 F. 349 (D.S.D. 1922), cited by Justice Black with approval in *Seymour* dealt with the same particular Todd County checkerboard problem resolved by the court in *Kills Plenty*. The court in *Frank Black Spotted Horse* resolved the issue in the same manner that was later followed in *Kills Plenty*. The *Kills Plenty* decision cited by the Revisor with approval, eliminated as a practical matter the Section 6 pattern of checkerboard jurisdiction in the only area of the Rosebud Reservation which existed at that time.

2. 18 U.S.C. § 1151(c): Allotments on the Public Domain.

In 1948, Congress knew that the definition of Indian Country set forth in 18 U.S.C. § 1151(a) would not encompass those trust allotments on the public domain in areas of what had formerly been reservations. As a result, 18 U.S.C. 1151(c) was set forth as an addition to the definition of Indian Country.

> (c) [A]ll Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Logically, to support the continuation of these allotments as Indian Country, the Reviser cited the decision of this Court which held that an allotment on the public domain in the opened area of what had previously been a reservation should continue to be subject to federal jurisdiction:

> Indian allotments were included in the definition *on authority of the case of U.S. v. Pelican*, 1914, 34 S. Ct. 396, 232 U.S. 442, 58 L.Ed. 676. Eightieth Congress House Report No. 304, Reviser's Note, 18 U.S.C. § 1151.

In *Pelican*, cited with approval in *DeCoteau* at 447, this Court held that federal jurisdiction was not extinguished merely because a trust allotment had been left behind on the public domain when a reservation was "diminished" after an opening of a portion of that reservation. Specifically, this Court in *Pelican* was involved with the 1892 opening of the north half of the Colville Reservation which disestablished approximately one-half of the Colville Reservation. To this extent, 18 U.S.C. § 1151(c) specifically approved and provided for limited checkerboard jurisdiction. Some provision had to be made for the numerous Section 5 surplus land statute openings which had left behind trust allotments situated on the public domain outside the boundaries of a reservation. Respondents would submit that this provision, 18 U.S.C. § 1151(c) is precisely tailored to fit the situation in the areas affected by the Rosebud Acts. *This is the only section of 18 U.S.C. 1151 that has been or was intended to apply to Gregory, Tripp, Lyman and Mellette Counties.* This conclusion is specifically supported by the Eighth Circuit decision in *Beardslee v. United States*, 387 F.2d 280 (CA 8, 1967).

Beardslee involved essentially the same Todd County issue that had been presented in *Kills Plenty* and *Frank Black Spotted Horse* and the same result followed, i.e., the absence of checkerboard jurisdiction inside the diminished reservation. *Beardslee* was decided after the *Seymour* decision and specifically mentioned Gregory, Tripp, Lyman and Mellette Counties:

> The Rosebud Reservation was established by, and is described in, Section 2 of the Act of March 2, 1889, 25 Stat. 888. The boundaries of Todd County, in which the town of Mission is located, are laid down in S.D. Code, Section 12.0162 (1939). All of Todd County is obviously within the original boundaries of the Rosebud Reservation. Only three Acts of Congress have affected the *territory* of the reservation since its establishment in 1889 and none of these concern Todd County. Act of April 12, 1904, 33 Stat. 254; Act of March 2, 1907, 34 Stat. 1230; Act of May 30, 1910, 36 Stat. 448. No part of the Todd County portion of the reservation has ever been formally opened. Instead, that portion has remained closed since 1889. *The general geographical situation is thus clear.* 387 F. 2d at 285.

More importantly, the opinion referred to "a disestablished portion of the reservation, however that disestablishment may have been effected," (387 F. 2d at 286), and specifically stated that:

> . . . Clause (c) came into the statute as the result of the holding in *United States v. Pelican*, 232 U.S. 442, 34 S. Ct. 396, 58 L. Ed. 676 (1942), namely, that lands allotted to Indians remained within the definition of Indian country even though the rest of the reservation was opened to settlement. See Reviser's Note following 18 U.S.C.A. § 1151 (1966), and 80th Congress House Report No. 304. Clause (c) is an addition to and not a limitation upon the definition of Indian country embraced in the preceding portions of § 1151. *We regard clause (c) as applying to allotted Indian lands in territory now open and not as something which restricts the plain meaning* of clause (a)'s phrase "notwithstanding the issuance of any patent." Although this result tends to produce some checkerboarding in *non-reservation land*, it is temporary and lasts only until the Indian title is extinguished. The congressional purpose and intent seem to be clear. *Beardslee, supra* at 287.

Nice, Frank Black Spotted Horse, Kills Plenty, and *Beardslee*, are the only cases wherein the Eighth Circuit has been presented with a question involving Indian jurisdiction on the Rosebud Reservation. One cannot read these opinions without concluding that Gregory, Tripp, Lyman and Mellette Counties were simply not considered to be within the limits of the Rosebud Indian Reservation. [23]

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23. In addition to the *Nice, Frank Black Spotted Horse, Kills Plenty*, 18 U.S.C. 1151(a) and *Beardslee*, the enactment of liquor prohibition legislation narrowing 18 U.S.C. 1151(a) in 1949 also substantiates that Gregory, Tripp, Lyman and Mellette were not considered to be within the reservation and that Todd County was considered to be the entire reservation. In that year, the law prohibiting the introduction of alcoholic beverages within reservations was amended to exclude fee-patented land within "non-Indian communities" and "rights-of-way" through reservations. *See, generally United States v. Mazurie*, 419 U.S. 544, 547 (1975) which presented a reservation fact situation corresponding to Todd County. Just as Todd County had

Some checkerboarding is inevitable. The necessary result of 18 U.S.C. § 1151(c) and this Court's decision in *DeCoteau* was limited checkerboard jurisdiction on the former Sisseton-Wahpeton Reservation.

The court in *Beardslee* correctly interpreted 1151(c) as applying only to "non-reservation" situations. Section 1151(c) specifically acknowledges limited checkerboard jurisdiction. The Revisor's Note and the House Report stated that "Indian allotments were included in the definition on authority of the case of *United States v. Pelican.*" The *Pelican* case had specifically held that after the reservation had been diminished, the allotments outside that diminished reservation were still Indian Country and would remain Indian Country until Indian title had been extinguished.

Although in *Seymour*, Justice Black discussed at some length the problems of checkerboarding, he was concerned only with the rejection of checkerboard jurisdiction *within* the boundaries of a reservation. *Seymour, supra* at 358.

played a role in the enactment of the 1948 18 U.S.C. 1151(a) definition of Indian country via the *Kills Plenty* decision, the city of Mission, in Todd County, played an important role in the 1949 liquor prohibition legislation. In fact, the legislative history of this enactment reveals that Mission was the moving force behind the legislation. The City of Mission was clearly Indian country under 18 U.S.C. 1151(a) and it desired to be excepted insofar as the liquor prohibition was concerned. A series of correspondence on behalf of the city between South Dakota Governor M. Q. Sharpe and South Dakota Senator Chan Gurney, eventually resulted in the exception enactment of May 24, 1949, 63 Stat. 94. The official correspondence contrasts on the basis of the location of the boundaries of the Rosebud Reservation, the City of Mission and Todd County with the cities of Winner and Carter in Tripp County.

> The alleged possession or introduction of intoxicating liquor was upon a town lot in the incorporated town of Mission in *Todd County*, South Dakota, which is on *all sides surrounded by the exterior boundaries of the present Rosebud Indian Reservation.*
>
> Letter of November 2, 1948, from Governor M. Q. Sharpe to the U.S. District Attorney for the District of South Dakota.
>
> [In contrast to *Todd County*, which is *the* Rosebud Indian Reservation, liquor *can* be purchased at Valentine, Nebr., Winner or Carter [Tripp County], South Dakota.
>
> Letter of August 26, 1948 from Governor M. Q. Sharpe to Bob Devaney, Assistant to Senator Chan Gurney.

Obviously, Todd County was *the* Rosebud Reservation. Neither this liquor prohibition nor any other federal statute which depended for its application upon the existence of reservation boundaries has ever been deemed applicable to Tripp, Gregory, Mellette and Lyman counties since the Rosebud Acts.

In situations controlled by 1151(c), federal jurisdiction does not depend upon the existence or nonexistence of a reservation. In these situations, law enforcement officers would still theoretically have to "search tract books" and to this extent limited checkerboard jurisdiction has not been avoided by the language of Section 1151. *DeCoteau, supra* at 446-447.

In terms of the practical considerations of checkerboard jurisdiction in the area in issue, there is no necessity for "tract book justice," contrary to the position of Petitioner and *amici*. The vast majority of all crimes committed by the ten percent of the population who are members of the Rosebud Sioux Tribe, misdemeanors and felonies alike, are committed on non-trust land in populated areas. In fact, only ten percent of the total area even remains in trust and most of this trust land consists of grazing lands far removed from any populated area. The incidence of any crime on land of this character is negligible. Thus this limited degree of mixed jurisdiction has presented no serious problem to law enforcement in Gregory, Tripp, Mellette or Lyman Counties over the past 60 years.

Petitioner and *amici* can point to no specific Rosebud cases in which checkerboard jurisdiction has been a practical problem in the area in issue. Similarly, checkerboard jurisdiction within the boundaries of the former Sisseton-Wahpeton Reservation has also created no serious problems on a practical level either during the 80 years before the *DeCoteau* decision or since that decision.

E. The Treatment of the Open Area by the Tribe and the Bureau of Indian Affairs.

As the Supreme Court of South Dakota noted in a recent case that presented the question of whether that portion of the original Rosebud Reservation situated in Tripp County was disestablished by the 1907 Rosebud Act: "The State of South Dakota has exercised criminal and civil jurisdiction over the years *with the full acquiescence of all responsible*

federal authorities. State v. White Horse, 231 N.W. 2d 847 (S.D. 1975).

In light of the clear expression of congressional intent to disestablish portions of the Rosebud Reservation and subsequent treatment, it is not surprising that except for administrative details related to the existence of trust land located within Gregory, Tripp, Lyman and Mellette Counties, the Rosebud Sioux Tribe and the Bureau of Indian Affairs have until recently acted, considered and treated those counties as being outside and not a part of the Rosebud Reservation.

The most telling recent example of this are the circumstances surrounding the attempt of Lawrence Antoine to run for tribal president of the Rosebud Sioux Tribe in 1967. Mr. Antoine's petitions were refused when presented for filing on the ground that since he lived in Tripp County he was not a resident of the reservation. On advice of present Washington Counsel, the Tribe refused to accept his petitions because he was not a resident of Todd County which constituted the Rosebud Reservation. Therefore, the Tribe, while allowing a few isolated Indian communities outside of Todd County to have some representation on the tribal council, did not permit any non-resident of Todd County, i.e., someone who did not live on the Reservation, to hold the office of tribal president.

Similarly, the members of the Tribe living in Gregory, Tripp and Mellette Counties have consistently been refused the benefits from the commodities, relocation, head start, war on poverty and other similar programs. Such programs were only available to residents of Todd County or to members of the Tribe outside of Todd County living on trust land. If tribal members lived on fee patent land outside Todd County, they were referred to state and local social service agencies for similar programs.

In the late 1960's, the South Dakota Legal Services Program was active in creating a city housing authority in the City of Winner, Tripp County, so that tribal members living

in Winner could have decent housing. The BIA and the Tribe refused to build any housing projects which were not located either in Todd County or on Indian trust land in the other four counties. It is difficult to square the Tribe's actions in this regard with their current claim that all the areas opened by the three Acts in question remain within the boundaries of the Rosebud Reservation.

Fortunately, this denial of benefits and programs to tribal members living on fee-patent land in area in issue has been remedied by the holding by this Court in *Morton v. Ruiz*, 415 U.S. 199 (1973), that such benefits and programs shall be made available to tribal members living "on or near" the reservation. Thus, the question of disestablishment presented by this case should have scant effect on the ability of the Tribe and the Bureau of Indian Affairs to provide to all members of the Tribe the benefits and programs discussed by *Amicus* Association on American Indian Affairs, et al.

III

A VIABLE REASON TO ALTER WHAT HAS BEEN FOR OVER 65 YEARS, THE ESTABLISHED AND FUNCTIONAL INTERRELATIONSHIP OF THE ROSEBUD SIOUX TRIBE, THE FEDERAL GOVERNMENT AND THE STATE OF SOUTH DAKOTA DOES NOT EXIST.

Respondents have consistently taken the position that the three Rosebud acts disestablished portions of the Rosebud Reservation. Since the passage of those acts, members of the Rosebud Tribe, the State of South Dakota and the United States government have all consistently recognized and treated the area opened by those Acts as having been disestablished from the Rosebud Reservation. As has been shown *supra*, Petitioner's and *amici's* attempts to portray the subsequent legislative and administrative treatment of these areas as being a portion of the Rosebud Reservaton is untenable. The effect of the decisions of the courts below has been to preserve the status quo and the understanding of the

Tribe, the State of South Dakota, the United States government and citizens located in the areas in question.[24]

Significantly, members of the Rosebud Tribe have always, until very recently, treated the area in issue as being outside the Rosebud Reservation. The Tribe clearly realized that the Rosebud acts had disestablished portions of their original reservation. This realization for over 65 years has permeated every aspect of the interrelationship between members of the tribe and the state and local governments located in the area in issue. Similarly, the federal government has made an identical distinction between tribal members who reside either on trust land or in Todd County and those tribal members who reside on non-trust land outside of Todd County. This distinction has a rational basis only if the three Rosebud acts disestablished portions of the original Rosebud Reservation.

Since the early 1910's, the State of South Dakota and its local government subdivisions have been for all practical purposes the only governmental authority which has existed in the areas in question. The State of South Dakota and its local government units have provided the only general governmental services and law enforcement to this area. In Todd County, the Rosebud Sioux tribe has an existing tribal government which provides general government benefits and services for its members. The tribal government consists primarily of a tribal president and a tribal council, both of which are elected by a vote of tribal members only. While the exact powers of the tribe are not in litigation at this time, some mention of the scope of tribal powers and jurisdiction should be made since if this Court is to reverse the decision below, those powers will be exercised over the opened areas for the first time in over 65 years.

Petitioner provided a short list in its complaint consisting of these five powers: (1) criminal jurisdiction; (2) civil jurisdiction; (3) sales tax authority; (4) tribal taxing authority; and (5) tribal regulation of intoxicants. In light of the fact that South Dakota is not a Public Law 280 State, the resurrection of original reservation boundaries is not without serious consequence. Moreover, unfortunately unique law and order problems prevelant on South Dakota reservation in recent years have presented a fact situation to which the present federal and tribal system of law enforcement cannot adjust. This is especially true of the Rosebud Reservation. As the Chief Judge for the United States District Court, District of South Dakota, stated in a recent television news interview less than three months ago:

> The big jump in case load came in 1973 — the Wounded Knee takeover — and it's been climbing ever since. Mostly because of increased crime on the State's Indian reservations.
>
> South Dakota has had a greater increase in filings in federal cases, both civil and criminal, from 1970 to 1976 of any other district within the seven states within the Eighth Circuit Court of Appeals. Pine Ridge used to have the largest filings for criminal cases. *Now it's Rosebud*. I don't quite understand why that's true, but that's what it seems to be right now.
>
> Interview with
> Chief Judge Fred J. Nichol,
> August 11, 1976, KELO-TV,
> Sioux Falls, S. Dak.

At the same time, within the past two years, the Rosebud Sioux Tribe has enacted two important ordinances. The first ordinance asserts *complete* civil and criminal jurisdiction over *all* persons within the original boundaries of the Reservation. The second ordinance asserts the right to *remove* to the original boundaries of the Reservation *any* person deemed "socially undesirable." Although the tribal court has not issued any orders to date under the second ordinance, it does routinely issue and attempt to act on arrest warrants for non-members, felonies and misdemeanors alike, pursuant to the first ordinance. This is the same tribal court that issued an

24. Area residents are circulating a petition that contains a declaration to this effect. The signatures of both non-Indians and Indians alike attest that, within memory, the residents of the area in issue know only Todd County as the Rosebud Reservation.

order purporting to restrain the entire Federal Bureau of Investigation from executing federal felony arrest warrants anywhere within the same boundaries. Only the fact that a Todd County court case which challenges this assertion of jurisdiction over non-members on constitutional grounds is now pending in the United States District Court has prevented the upheaval that would follow such an exercise of jurisdiction by the Tribe even if it were limited to present Reservation.

In addition, tribal authority over zoning and development of natural resources and other areas is presently unclear. None of the above powers are trivial and would, if the lower court decisions are reversed, be exercised by the Tribe, a governmental unit in which the vast majority of the residents of Tripp, Gregory and Mellette Counties are not eligible to vote or otherwise participate in any manner whatsoever.

The State of South Dakota and its local government units have not been restricting or interfering with the ability of the Tribe to maintain essential tribal relations. The internal affairs of the Tribe remain and have remained the internal affairs of the Tribe only. Indeed,the recent decision in *Morton v. Ruiz* has expanded the Tribe's geographical area in terms of provision of services and benefits, although not with respect to jurisdiction and authority. Maintenance of the Tribal relationship does not require a resurrection of the original boundaries of the Rosebud Reservation. This tribal government and relationship will continue regardless of the Court's decision in this case.

For the Tribe in reservation areas to subject non-members to general tribal jurisdiction, special trader's licenses, taxes for the right to do business on the reservation, special statutes regulating intoxicants, professional competency certifications for the right to practice law or medicine or any other profession in a tribal hospital, court of law or whatever, or exercise any sovereignty which the tribe might lawfully exercise within the boundaries of its reservation today or 50 years from today is one thing. It is one thing to choose to

reside within the boundaries of a reservation. However, to subject the thousands of citizens who live within the area affected by the three Rosebud acts, to the same sovereign powers for the first time in 1976 is quite a different matter. Certainly to take such a drastic step, after 65 years of history in which the State of South Dakota and its local government units have exercised jurisdiction and general govenmental powers over this area, is unwarranted.

In the area in question, only 10 percent of the resident population are enrolled members of the Rosebud Sioux Tribe and less than 10 percent of the land remains in trust. As in *DeCoteau*, Respondents have exercised unquestioned jurisdiction over the unallotted land of the former reservation in these counties for over 65 years. In contrast, Todd County, the Rosebud Reservation, is predominantly populated by tribal members living on trust land. The state does not interfere with the Tribal right of self-government within Todd County and its exercise of jurisdiction over the areas in issue certainly does not result in the infringement of "the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217 at 220.

In addition to subjecting the individuals in the opened area to the sovereign power of the Tribe, when one considers the related loss of the inherent power of state and local government to regulate drivers licenses, license plates, motor vehicle safety inspections and other related regulatory provisions, misdemeanors, repeated offenses such as driving while intoxicated which are not felonies or even crimes under the Federal statutes, in an area where for all practical purposes neither the Tribe nor the federal government has ever provided adequate law enforcement protection for either tribal members or non-members, the effect of a reversal of the lower court's decision cannot be underestimated. The general welfare of tribal members living within the area in issue is not dependent upon the resurrection of the original boundaries of the Rosebud Reservation.

Many citizens of the United States, both members of In-

dian tribes and non-members, have elected to live within the boundaries of a reservation. They have knowingly decided to subject their lives and property to the many special Federal and tribal laws on such reservations. This choice presumably has been made with a realization as to the consequences of the choice. This would not be the case if this Court were to reverse the decision below. Fortunately, the clarity with which Congress expressed its intent to disestablish portions of the Rosebud Reservation when it opened them to settlement by passage of the 1904, 1907 and 1910 acts does not require such a reversal of the lower court's decision.

CONCLUSION

Congress' intent when it passed the 1904, 1907 and 1910 Rosebud Acts was to disestablish the portions affected by each of those Acts from the Rosebud Reservation. This intent is clear from the text of the act, the legislative history and circumstances surrounding each of those Acts. These acts must be viewed from the historical perspective in which the familiar forces of Section 5 of the General Allotment Act provided the fundamental basis for federal Indian policy. For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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